0033-3557

THE Public Interest

NUMBER 86, WINTER 1987, PRICE: $4.50

DISCARD
FEB 02 1987

THE CONSTITUTIONAL ORDER 1787-1987

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A SPECIAL ISSUE

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THE PUBLIC INTEREST (ISSN-0033-3557) is published quarterly by National Affairs, Inc. and appears in Spring, Summer, Fall, and Winter issues. Its office of publication is located at 10 East 53rd Street, New York, NY 10022. Subscription price: $18.00 for one year; $36.00 for two years. Add $2.00 annually for Canadian and foreign subscriptions. Unsolicited material cannot be returned unless accompanied by sufficient return postage. Second class postage is paid at New York, and at additional mailing offices. © 1987 by National Affairs, Inc. Postmaster: Please send all changes of address to: Public Interest Subscription Dept., 20th and Northampton Streets, Easton, PA 18042.

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Easton, PA 18042

Newsstand Distributor
Bernhard DeBoer, Inc.
113 E. Centre St., Nutley, NJ 07110

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"The spirit of '87"

IRVING KRISTOL

THE AMERICAN CONSTITUTION is a highly paradoxical document. Rhetorically, it is dry, legalistic, lacking in eloquence. Substantively, too, while it may not in fact have been "the work of men who believed in original sin," as James Bryce thought, it certainly reveals what one would call a "realistic" view of human nature—i.e., a view that is more alert to the absence of human virtues than to their presence, a view that is skeptical of the ability of human beings to govern themselves without the prior imposition of severe institutional self-restraints. There is no visible "democratic faith" in this Constitution. And yet—and yet it is a founding document that is venerated by a people for whom such a "democratic faith" is about as unquestionable a popular dogma as can be imagined in our secular age.

"Veneration" is not too strong a term, at least so far as popular opinion is concerned. (Scholarly opinion, of course, tends to look askance at such veneration, regarding it as just another popular delusion.) This condition has endured almost from the very beginnings of the nation. Though, as we know, the opposition to ratification of the Constitution was widespread and heated, within a decade such sentiments had evaporated. What that distinguished constitutional scholar, E. S. Corwin, has called (contemptuously) a "cult of the Constitution" quickly made its appearance. Such terms as "glorious," even "sacred," became the conventional cliches. So strong was this feeling, and so positive a political fact was it deemed to be,

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that James Madison refused to publish his *Notes on the Constitution* in his lifetime, lest the revelation of disagreements and debates and compromises at the Constitutional Convention have a subversive influence. (Since he enjoyed a long life, those *Notes* were not published until 1840.) Even the Civil War failed to disrupt the popular attitude, since both sides appealed to the Constitution as the vindicator of their positions. When, in 1878, Gladstone made his much-quoted tribute ("the most wonderful work ever struck off at a given time by the brain and purpose of man"), it was immediately accepted as fair and appropriate comment. And it has been accepted as such ever since, despite a flood of muckraking scholarship that began about 1910 and flourished for several decades thereafter. This scholarship, associated with the writings of Charles A. Beard and others, portrayed the Constitution as a repudiation of the principles of the Declaration of Independence by the moneyed interests. But the tide of that scholarship has now subsided—too much of it was pseudo-scholarship, it turned out. In any case, it never really touched the popular nerve.

A "covenanting community"

Obviously, the American Constitution is unlike any other of the world's constitutions, of which by now there are so many. Not only is it the oldest, not only has it "worked" as none other has, it is different *in kind*. This difference was nicely caught by Whittle Johnson in an article in the *Yale Review* almost twenty years ago, when he pointed to the special status of the Constitution as a *covenant*: "What, then, does it mean to be an American? . . . To be an American means to be a member of the 'covenanting community' in which the commitment to freedom under law, having transcended the 'natural' bonds of race, religion, and class, itself takes on transcendent importance."

"A covenanting community"—this, I think, defines with neat precision a crucial dimension of the American body politic. This body politic is not just a "political system," as most of our political science textbooks have it. It is that, of course, but it is also more. This body politic, in the eyes of its citizens, has always had a quasi-sacramental status. It is no exaggeration to say that the Constitution along with the American flag and the Declaration of Independence constitute the symbolic trinity that affirms this status.

Even today, young people in public schools recite—in some cases daily—the Pledge of Allegiance to the Flag "and to the Republic for which it stands." Is there anything comparable in any other

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democratic country? These children are descendants of immigrants who, when they became naturalized citizens, swore their allegiance to the Constitution, perceived as the wonderful fruition of the Declaration of Independence (to which any oath of allegiance is deemed supererogatory). One learns by heart the Pledge in elementary school; in high school one learns by heart at least the opening sentences of the Declaration along with the preamble to the Constitution ("We, the people . . ."). One doesn't simply memorize them —one learns them *by heart*, since the recitation is supposed to be heartfelt, an exercise in solemn dedication.

The Flag, the Declaration, the Constitution—these constitute the holy trinity of what Tocqueville called the American "civil religion." As is inevitably the case with holy trinities, the exact relation of each member to the other gives rise to theological (i.e., jurisprudential) disputes, and one such dispute resulted in the bloodiest war in American history. But, on the whole, the American people have felt very comfortable with their trinity, despite all controversies on issues of transubstantiation.

So there is a *spirit* of the Constitution, enveloping the text and transforming it into a covenanting document, a pillar of the American "civil religion." But what is this spirit? Where does it come from? What gives it its sustaining power?

It is the failure to address such questions that makes so much —not all, but so much—of the scholarly work on "the intellectual origins of the Constitution" less than satisfactory. This work is very fine indeed in exploring the origins of the American *political system*, but it too often seems impotent to explain the "spirit" that animates and pervades this system. Thus, there is no doubt that the writings and philosophy of John Locke were a preponderant influence on the authors of the Constitution, but the fact remains that what they wrought was a covenant, not merely a social contract. And the same can be said of all those other very visible intellectual influences—Montesquieu, the British republican pamphleteers of the eighteenth century, the Continental jurists of the era, as well as the Scottish philosophers of the Enlightenment. These influences were real enough, and they must be studied to understand the Constitution as it emerged from the Constitutional Convention. But all of them together do not add up to the Constitution we *revere*.

The Protestant impulse

The American Constitution has many intellectual fathers, but only one spiritual mother. That mother is the Protestant religion

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—perhaps one should say the Protestant impulse—in its various American forms. The idea—and more important, the sentiment—of the American people as a "covenanting community" comes from Calvinism. The idea of this community being governed by elected representatives comes not from memories of a feudal parliament (as in Europe), but from Puritanism and Presbyterianism. The conviction that all men have equal access to God, that freedom of conscience has divine sanction, that a large measure of individual liberty is consonant with a moral life—all are derived from the impulse toward spiritual individualism of various dissenting and pietist sects, some of whose teachings ended up closer to Deism than to Christianity. What we call the "Protestant ethic" or the "work ethic" —a religious or quasi-religious insistence that the exercise of one's mundane responsibilities was a form of piety—comes from Puritanism and then (in a more massive way) from Methodism. Benjamin Franklin's *Poor Richard's Almanack* had very little overt religiosity in it—the author was at most a rather casual Deist—but that book could not have been written, and would not have been widely read, in an environment that had not previously been shaped by the Protestant experience. That ethic became a moral code for all honest, God-fearing men and women, a code that infused the new "bourgeois" society with a religious aspect. So powerful had this Protestant influence been that Catholicism and Judaism, as it became "Americanized," also became—often after much futile resistance—markedly "Protestantized." Judaism, of course, had always had its own version of this ethic, which is why Puritanism placed such an extraordinary emphasis on the Old Testament.

So the structure and functioning of American government—what might be called its statistics and dynamics—have unquestionably been shaped by secular political philosophers, but what has *sanctified* their work are popular attitudes derived from religion, not philosophy. After all, "America" existed, as a new nation in embryo, before the Constitutional Convention, before even the Revolution. The various colonial state charters, and the state constitutions during the period 1778-1787, all foreshadowed (if in varying degrees) the basic premises of the Constitution. That "Americans" as a distinctive human type, participating enthusiastically in a distinctive "American way of life," preexisted the Revolution is testified to by the reports of all European visitors. The Revolution delivered the new body politic, the Constitution covenanted it, but it had been conceived out of the wedding of the Protestant ethos with American circumstances.

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One legitimate offspring of this marriage circumstance was the early commitment of Americans to the making of money and the acquisition of property—to "bettering their condition," as Adam Smith would later put it. There can be little question but that this predisposition issued from the "Protestant ethic"—the belief that a life spent in the legal pursuit of wealth and income could be a *righteous* life. Not a holy life, certainly, or even the most authentic or admirable of possible human lives—but righteous, even taking its self-imposed limitations into account. This belief has powerful economic effects, as all students of "modernization" know. Moreover, the economic potency of this belief has survived its secularization, which is part of its "Americanization." There is a very great difference between the Presbyterian John Knox and our own Benjamin Franklin. But it is precisely this difference that has allowed generations of immigrants, whatever their religious origins, to join the American covenant—to accept those bourgeois pieties that promised a "better life" without giving any thought to the religious origins of these pieties.

Indeed, so powerful is this Protestant-American impulse to "better one's condition" that it defines the exceptional way Americans subconsciously and automatically think about the politics of their constitutional order. When I teach the Constitution, I like to ask the class this question: "When we elect a representative to Congress, whom does he represent?" Only the occasional European or Latin American student sees the point immediately. The American students, suspecting a trap, are slow to give the obvious answer: He (or she) represents the people in his district, his "constituency." They do come forward with this answer eventually, at which point I inquire: "*All* of the people in his district—including those who voted against him?" Yes, of course. And suddenly enlightenment dawns—the realization that there is something special about this American assumption. In no other country in the world does the electoral process proceed on any such peculiar assumption. Everywhere else, elected representatives represent mainly their parties and the ideology of their parties, which is identified with the "public interest." Only in America is it taken for granted that they ought to represent, first of all, the economic interests of *all* of their constituents. This can be taken for granted because it has been assumed for two centuries now that all of those voters are more interested in improving their economic condition within the framework of a settled way of life than in any ideology or "cause"—or at least expect their political representatives to work toward that economic end rather than

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expending too much energy promoting any particular ideology or "cause." Surely the main reason that the socialist idea has been so weak in America is the fact that it necessarily violates this political constitutional assumption.

Civil religion and moral truths

It follows that the Constitution is inextricably intertwined with the idea of economic progress. It has always been perceived to be so. Up until the Great Depression, it was routine for orators to link American prosperity to the Constitution, as effect to cause. Even today our new immigrants, as they take their oath of citizenship, clearly have this connection very much in mind.

But, for many Americans, this linkage has been blurred in recent decades. The increasing secularization and "thinning out" of our "civil religion," while broadening its scope, has both vulgarized it and weakened it. The vulgarization takes the form of conceiving of American society, and bourgeois society in general, as little more than an "acquisitive society" where "free enterprise" flourishes. This provokes an antibourgeois animus among the better educated, who see such a society as a modern version of Plato's "city of pigs," while inciting many of the young to a libertarian hedonism that, by traditional standards, is nothing short of licentious. At the same time, the larger populace becomes uncertain of its "values" (as one now says), and its commitment to our constitutional traditions, though seemingly firm, becomes brittle.

The truth, which we are in danger of forgetting, is that a "civil religion" both engenders and requires a *moral* endorsement of a regime, not simply a utilitarian one. It is such a moral endorsement that always led Americans to believe that their constitutional order is not only efficient or workable, but also just. For such an endorsement to prevail, the "civil religion" must be at least minimally nourished by its religious roots.

As the infinitely wise Tocqueville put it: "I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions." The overwhelming majority of Americans still hold to that proposition today—but more anxiously and tentatively. They agree with George Washington when he remarked, in his Farewell Address, that one could only "with caution indulge the supposition that morality can be maintained without religion." But they see this "supposition" unqualifiedly and incautiously insisted upon by the bulk of our edu-

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cated and professional classes—people who, after all, are really supposed to know about such matters. This makes them confused, unhappy, angry. What kind of polity is it, they wonder, in which we know so much more than our forebears but don't know how to go about explaining to our children right from wrong?

A "covenant" is meaningless unless it is based on moral truths which, if not undisputable in the abstract, are not widely disputed in practice. The source of such moral truths has always been a religious tradition or a composite of religious traditions. Science cannot provide such moral truths, neither can philosophy; both can only offer us reasons for skepticism about them. But a "way of life" involves commitment, and only a religious attachment, however superficial, can provide that.

All observers note, and all opinion polls confirm, that Americans as a people are more religious than their West European counterparts. But that this fact may have something to do with the prosperity and political stability of the United States, or with the spirit of patriotism that is still so pervasive in this land, is studiously ignored. The bicentennial of the Constitution would seem to be a suitable occasion not merely for celebrating, not merely for taking thought, but for offering up a prayer on the Constitution's behalf. One assumes it would not object.

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The Constitution and American diversity

NATHAN GLAZER

THE CELEBRATION of the framing of the American Constitution comes close upon the heels of the celebration of the hundredth anniversary and rededication of the Statue of Liberty. This is, of course, sheer accident: The Statue was originally intended to celebrate the hundredth anniversary of the Declaration of Independence, and it was only the difficulty of raising the money to finish it and erect the pedestal on which it was to stand that delayed its completion ten years, almost in time for it to mark the hundredth anniversary of the other great founding document of the American Republic, the Constitution. And one might well think that if the Statue were to celebrate the Constitution, there would be an interesting clash between what the Constitution says (or rather does not say) and what the Statue has come to symbolize in the popular mind.

The Statue stands for free immigration, the gathering in of the tired, poor, and huddled masses. It stands for American ethnic and racial diversity, as was so insistently drummed into us in the course of the celebrations. Yet on this the Constitution is silent. Regarding racial diversity, it has only those now obsolete provisions on how long the slave trade could continue, on how slaves were to be counted for purposes of electoral representation, and on the exclusion of Indians

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in determining the basis of electoral representation. Concerning ethnic diversity, it says nothing. The Constitution was framed by "Anglo-Americans" (not a single signer comes from any other ethnic group). It is silent as to immigration, and it was not until 1876 that the Supreme Court ruled that control over immigration was exclusively in the hands of the federal government. That it was expected there would be immigration is indicated in the provisions giving Congress the power to "establish an uniform rule of naturalization," and other provisions requiring that the president be a native citizen, and that members of Congress and the Senate be citizens for a certain number of years. But as to any right to immigration or asylum, or any restriction on the power of Congress to limit immigration by race and ethnicity, it is of course silent.

On religious diversity, we find the provision that no religious test could be set for public office and the pregnant opening phrases of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," phrases which come before those on freedom of speech, press, or assembly. But as a protection of diversity, one may doubt its (initial) efficacy. Indeed, one school of thought argues that the prohibition of establishment was meant to *protect* the establishments that existed in the states. "At least some evidence exists," writes Laurence Tribe in his authoritative treatise on the Constitution, "that, for the framers, the establishment clause was intended largely to protect state religious establishments from national displacement." A footnote continues: "Until 1844, New Jersey limited full civil rights to Protestants. Pennsylvania and Maryland required belief in God of public office holders, Maryland until 1961. Connecticut taxed for the support of the Congregational establishment until 1818. The Massachusetts constitution, until 1833, authorized towns to maintain ministers where voluntary contributions were inadequate; New Hampshire did so until the twentieth century."

Diversity before the Court

The Constitution, with the Bill of Rights, may have been well-designed to protect individual rights. But little of the then existing religious, racial, and ethnic diversity of the United States was reflected in it, and no grand plan was laid down for any diversity that might be expected in the future. The diversity that concerned the Framers was that between large and small states; and "diversity" in American constitutional law refers to differences among the laws of the states, not to the diversity of religion, race, and ethnicity.

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The protection that religious, ethnic, and racial groups needed and sought they found, until after the Civil War, if they found it at all, in the political processes of the states, not in the Constitution, and in the widespread favorable attitude toward free immigration—until the Chinese, that is, were banned in 1882, and restrictionist sentiments led to further limitations on what races and what groups could enter. Blacks, as we know, received no protection under the Constitution until a bloody war led to the addition of the Thirteenth, Fourteenth, and Fifteenth Amendments. Even then a rather strange line of interpretation of the Fourteenth Amendment's "due process" clause meant that it served more as a protection of business than of blacks for sixty years.

Nevertheless, it is on the basis of the key phrases in the Fourteenth Amendment, with their direct imposition of restrictions on the states (to "deprive any person of life, liberty, or property without due process of law" or "deny to any person within its jurisdiction the equal protection of the laws"), that the religious, racial, and ethnic groups of the United States are ensured equal treatment and independence in a vast range of activities—education, religion, philanthropy, political action. And despite a restrictive line of interpretation regarding what limits these provisions imposed on the states, and on how much they protected the blacks, quite early the Supreme Court expanded their protection to other groups. In 1886, it struck down a California law that was applied only to the Chinese, and in 1906 it declared of the Thirteenth Amendment, "Slavery or involuntary servitude of the Chinese, the Italian, the Anglo-Saxon were as much within its compass as slavery or the involuntary servitude of the African." It is not until the 1920s that we find any protection at the federal level for the right of ethnic or religious groups to maintain their differences and distinctiveness through education: In *Meyer* v. *Nebraska* (1923), the Court struck down a Nebraska state law prohibiting the teaching of foreign languages in schools before the eighth grade, and in *Pierce* v. *Society of Sisters* (1925) it struck down an Oregon statute requiring all children to attend public schools. This decision borrows from the Fourteenth Amendment's guarantee of due process, and emphasizes the teacher's and parent's liberty to pursue a vocation and conclude contracts: The infamous "substantive due process" that had been used to strike down so much social legislation here served to protect a key right of ethnic and religious groups.

This cautious use of the Fourteenth Amendment was abandoned in the postwar period, and particularly since the *Brown* decision on

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the segregation of blacks in public schools in 1954. But no obvious resting place can be discerned in the expansion of the protection of religion, racial, and ethnic diversity in a country of enormous diversity. The picture presented by the constitutional protection of diversity today is no longer one of rights inadequately and insufficiently established but one rather of rights clashing with each other: individual rights against group rights, group rights against group rights, both individual and group rights against the state, and, most intriguingly, individual and group rights against the right of the state to embody community values in its legislation and action.

As a first cut at the problems that have arisen, it is necessary to understand that the provisions of the Constitution we have referred to, and almost all of the legislation that implements them, defend *individual* rights. This is true of the clauses dealing with the free exercise of religion, the nonestablishment of religion, religious tests for office, the guarantee of due process, and the equal protection of the laws. These are all matters of the defense of an individual's claim: Every case sets an individual against an agent of government or a level of government. The rights that are protected may indeed be hardly connected with the life of any group—religious, ethnic, or racial. They may be rights to individual conscience unconnected to any group belief or loyalty or culture: the right to be an atheist, and yet hold public office; the right to maintain a personal opposition to war, and not be subject to the draft.

Despite the language that frames them, however, all these clauses refer, by implication, to the rights of groups, religious, racial, and ethnic. Similarly, the rights that follow the free exercise and establishment clauses in the First Amendment (Congress may also not make a law "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances") are individual rights. But clearly groups lay claim to them (particularly political groups), and they serve to protect group freedoms. The connection between individual rights and group rights, however, is complex: The interests of the group and of the individuals that make it up are not identical, and conflict between them is indeed possible. Religious, racial, ethnic, and political groups (parties, movements) in the United States are voluntary, with no power of state action. They may find it necessary on occasion to defend themselves against the state. But at the same time the individuals within them, despite their voluntary character, may find it necessary to defend themselves against the group.

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Individuals, groups, and the state

The rights of an individual may thus also be threatened by one of those diverse groups whose freedom of action we want to preserve in our diverse society. Religious groups have no state power, but they have the power that comes from the ownership of property, the strength of organization, the ability to mold the opinions and the actions of adherents. In all these ways, they inevitably have the power to act against the interests of individuals. The civil liberties and civil rights we have discussed in a somewhat amalgamated fashion may thus stand against each other. Individual conscience may stand against group power—and group conscience.

One of the major cases setting the limits of state power against the group also raises the question of group power over the individual. It arises, as so many cases involving group rights and limits do, in the context of education. In *Wisconsin* v. *Yoder* (1972), the question was raised whether the state of Wisconsin could require the children of members of the Old Order Amish religion and the Conservative Amish Mennonite religion to attend school until the age of sixteen, as state law required. The issue was not whether they would have to attend a public school—that was settled by *Pierce* v. *Society of Sisters* in 1925. But they were required to have schooling of some kind. Parents of children not in school were tried and convicted of violating the compulsory-attendance law and fined. They argued in their defense that under the "free exercise of religion" clause of the First Amendment, incorporated into the Fourteenth, they had the right to refuse to send their children to high school beyond the age of fourteen or fifteen. They believed that their children's attendance at high school, public or private, "was contrary to the Amish religion and way of life." They believed that by sending their children to high school, they would not only expose themselves to the censure of the church community, but, as found by the county court, "endanger their own salvation and that of their children."[1] The Supreme Court upheld their right to keep their children out of school.

But what of the rights of the children? Justice Douglas in dissent argued they would have to be taken into account: "If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notion of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such

[1] Wisconsin v. Yoder, 406 U.S. 205 (1972).

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an imposition without canvassing his views. . . . Religion is an individual experience."

The American voice and one American dilemma are heard in that last sentence: "Religion is an individual experience." Yes, but religion is even more a group experience. The *Yoder* case brings up the issue of group versus individual rights in an exceptional situation, that of a small religious group whose family life is exemplary and highly admired. The situation arises in other contexts, where the group does not enjoy such high public repute, as in the many cases where parents whose children have been, as they would put it, "captured" by new sects that separate them from their families, forcibly take possession of them in an effort to change their views. The United States remains a country of continual group creation, particularly in the sphere of religion. It has spawned hundreds of sects, some of which have become strong and respectable. The free exercise of religion does not give them unlimited rights—the Supreme Court stood with Congress in denying the Mormons the right to polygamy under the free exercise clause, and polygamy was stamped out by force.

The clash over rights

As American diversity expands, under the impact of six hundred thousand immigrants a year, primarily from Asia and Latin America, issues in which individual rights clash with the maintenance of group authority—and thus with the opportunity to maintain "diversity"—will undoubtedly become more complex. Consider the implications of an increase, for example, in the Muslim population (fortunately for problems of diversity, this is only a very small part of recent immigration). The problem here is less one of polygamy—I am not aware whether it has created conflicts with civil law in the United Kingdom, France, and Germany, where Muslims are more numerous than in the United States—than one of the rights of women and female children. American law now, in its expansion of the rights of women, has made it difficult to maintain single-sex schools. Indeed, in the public-sector schools, this is all but impossible. What then if Muslims raise the same claims as the Old Order Amish in order to protect their female children?

But we need not go to such exotic possibilities to see the clash between group rights and individual rights, state versus group, and group versus group exhibited. The individual rights of the Constitution envisage as the chief danger an abstract state enforcing uniformity on diverse individuals (or, by extension, as we have seen, on groups and peoples). But the state is restrained by constitutional

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protections from interfering with a community, racial, religious, or ethnic group that participates in a certain way of life, holds certain beliefs, or engages in some organizational activity. The state, though, in its specific manifestation also embodies, to some degree, such a community. A school district, a village, a town, even a city, may not be marked by the diversity common to the United States in general. Its homogeneity may be ethnic or religious or racial. When it wishes to express or symbolize, through public action, a religious or group practice or belief, another kind of conflict between community and individual—or community and community—is involved. One community has the power to pass laws, to compel uniform behavior. An individual or another community resists this. The present thrust of constitutional law strongly limits the community acting as the state. It may not require (nor may an individual school district, school, or teacher) a prayer, or the reading of the Bible, or the placing of the Ten Commandments on the school walls. To those who want to do these things, this is the "free exercise" of religion guaranteed by the First Amendment, or perhaps the state simply upholding a conventional and universal morality. To those who oppose them, they are examples of the "establishment of religion" prohibited by the same amendment.

These actions are seen by those who want them returned to the schools as of the same order in helping to raise responsible and dutiful children as the actions of the Amish in withdrawing their children from the secular and godless and hedonistic high school. The latter is protected—this is the action of a voluntary community engaged in "free exercise." The former is prohibited—it is "establishment." Even when the action is voluntary (as in the case of a moment of silence for "meditation or voluntary prayer"), the law authorizing it has been held unconstitutional under the establishment clause. There is an answer to those who wish to exercise the practice of their community in the school—withdrawal of their children from the public school and placing them in a private religious school, where prayer is not only permitted, but, if they so wish, prescribed. But there is a cost to such an action, a cost to the "free exercise" of religion, which in other contexts may not be imposed.

Much of the most fiercely disputed constitutional litigation in the United States today revolves around this question of what a community of religion, ethnicity, and race may do in the way of protecting its values and its way of life when that is attempted through the medium of state action. American diversity and American constitutional protection make it very difficult to do this. For example, how far may a community go in restricting the sale of por-

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nography, the exhibition of pornographic movies, and the like? To some extent they fall under the protection of the First Amendment. But to an extent far greater than communities, as represented in municipalities and other local governments, would like to allow. How much respect may a community grant its churches? May it reach the point of allowing a church a veto over the right to sell liquor in its neighborhood? The state of Massachusetts granted this right; the Supreme Court said no. Some major American religions oppose the sale of alcohol and public drinking: Combined with other reformers they were able, remarkably, to pass the Eighteenth Amendment to the Constitution prohibiting the making or selling of "intoxicating liquors," in 1920. Were they imposing their religious views on the American people ("establishment")? Were they, by placing restrictions on the religious practices of Jews and Catholics, limiting "free exercise"? These issues were constitutionally moot because Prohibition was embodied in an amendment to the Constitution itself. It created such problems that it was finally repealed by yet another amendment (the Twenty-first in 1933), but in this amendment full powers to control the transportation and importation of "intoxicating liquors" remained with the states, and thus we have the crazy-quilt of regulation from state to state, and from community to community.

For the past ten years or so we have seen a strong revival of the "fundamentalist" or evangelical trend in American religion, embodied principally in Southern Baptism, but reaching in varying degrees into most of the major Protestant denominations. In the 1920s, two key demands of this tendency were that evolution not be taught in schools in opposition to the Biblical account of creation, and that liquor be prohibited. They lost on both counts, and fundamentalism was subsequently considered a backwater of American life that would not become nationally significant again. It has, basing itself now on new issues, issues in large measure created by a liberal and progressive trend in constitutional interpretation which defends the rights of individuals against locally dominant groups that can implement their view through state and local legislation. The prohibition of school prayer, of restrictions on abortion, of support to private schools (since they are mostly religious, this would violate the Establishment Clause), the defense of student rights against school-imposed discipline, the defense of "sexual preference" (the rights of homosexuals and lesbians) all fall within this general category. As a result, a true *kulturkampf* now rages in the United States, and the Constitution offers no guidance as to how it may be resolved.

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Diversity and discrimination

The issue of the protection of diversity is also raised by a very different set of conflicts pitting individual rights against group rights, those dealing with the attempt to overcome discrimination against blacks (and some other minority groups) through constitutional and legal prohibition of discrimination. The problem here is not so much the protection of a specific culture or religion. A regime of discrimination and prejudice against blacks and Asians coexisted very nicely with the maintenance by these groups of associations, churches, language schools, or whatever else they wished. Indeed, the complaint of blacks was that through segregation they had rather more of their own schools and churches than they wished: They wanted to overcome discrimination and prejudice so as to enter the mainstream of American life. This was done by means of constitutional interpretation and laws against discrimination, again phrased as the defense of individuals without regard to color, race, or national origin. That is the way the Constitution is interpreted ("equal protection of the laws"), that is the way the legislation is written. Once again, trying to deal with prejudice and discrimination against groups, we nevertheless refer to no group (except in rare cases) but defend *individuals*. The rights in question are to education in an unsegregated and integrated setting, to jobs and promotions and rental and purchase of housing and access to public facilities without discrimination on grounds of race, color, or national origin. But all this has implications for ethnic and racial diversity.

Consider, for example, the first consequence of effective integration of the segregated black schools of the South. Black principals and administrators and teachers were dismissed, found to be in "excess," as two different school systems were merged into one. The capacity (I am not sure it was ever much exercised) to create an education in some way reflecting or directed to the segregated group disappeared. One form of "diversity" declined. If blacks had been more interested or effective in entering white churches, another key protection of diversity for the black group, the black church, would have declined.

But other groups—and their ability to maintain their diversity—were also affected. The fierce conflicts that developed over school busing were largely over diversity, though they were not often presented, in the constitutional or scholarly or even popular literature, as a conflict of this type. The key *Brown* decision declared segregation by race in education unconstitutional, as denying the equal protection of the laws. But what was the right that was granted?

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Was it the right to admission to any school without racial restriction, or was it the right to an educational setting with a majority of the majority race and a more than token number of persons of one's own race? The argument for the latter was that if very few persons of the protected race chose a given school setting, it was demonstration that in effect segregated schooling continued (through intimidation or otherwise), and no further examination was required judicially as to why. And if too few members of the majority race were present, that was also a demonstration that segregation persisted. Under such circumstances, children could be assigned to school by race so that segregation was in fact overcome. Other arguments could have been added to this key one, but the Supreme Court did not go into any educational reasons why certain proportions of a minority group and a majority group were necessary in each school (to overcome their self-consciousness as a minority, to provide them with the power to demand better education, etc.).

Under Supreme Court decisions, assignment to schools by race for minority and majority children became common. Children content with their schools were assigned by race to other schools to create a balance in each school. These children could be from communities which desired their children to remain close to their homes, and which preferred them to be educated among those of their own group. Thus, the Chinese children and Mexican-American children of San Francisco were bused in order to provide an integrated setting for blacks. These communities were affected in their opportunity to maintain certain close ties among themselves, to create conditions in which they would have a better chance of surviving as distinct communities. The latter rights are not defended by the Constitution, yet if we are sympathetic to community maintenance, we cannot be indifferent to the impact of sending a community's children to schools that are selected simply so that their group can provide a majority in that school for black children.

While these measures were developed primarily to implement the rights of blacks, many blacks doubted that this kind of dispersion was what they wanted for the education of their children. Indeed, some looked back nostalgically at some of the schools blacks had maintained during the period of segregation, in part because they *were* black community institutions.

This issue of community and its relationship to school integration could be raised in a different way. Communities differ in values, orientation, behavior. It may well be right that the primary objective in school assignment should be to mix communities so all

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should learn about each other. But if some of these differences relate to the use of language, or sexual attitudes, or religious attitudes, the parents in some communities will wish to protect their children and reject homogenization. Or they may simply reject closeness to blacks, and thus create private schools ("segregation academies") in response to judicial desegregation decisions. Sometimes it is perfectly clear that the only reason such schools have been established is because of racial objections to going to school with blacks; in other cases, motives are more mixed and may indeed be predominantly religious or moral, such as the fact that schools cannot provide religion, or prescribe modest dress rules, or impose a traditional discipline in the schools. These schools are often established directly by churches and meet on church property. Are these schools entitled to tax exemption as schools? Or does the fact that they have no or few black children demonstrate they are racially segregated and should not be eligible for tax exemption?

Containing the conflict

There is no question that conservative communities in the United States now feel threatened as a result of the expansion of civil rights and civil liberties. And that liberal communities now feel threatened by the mobilization of the traditionalists. On one side, the expansion of rights may be seen as giving the greatest possible freedom to the individual—and in that freedom individuals can create the subcommunities they desire, whether traditional or radical, conventional or unconventional. On the other side, this expansion may be seen as the arrogant extension of values and behavior that threaten traditional communities so that they cannot protect their schools and their neighborhoods from intrusions they find offensive, and that prevent them from providing the environment they desire for their children. This was the claim *Yoder* made in refusing to comply with the compulsory attendance laws of the state of Wisconsin; it is a claim now raised by that very large section of the American population that adheres to traditional values. As a result, other individuals and communities, characterized by liberal and progressive values, feel that they are threatened in their lifestyles. The conflict breaks out everywhere: when New York City insists that its institutions that provide social services must not discriminate against homosexuals—and the Catholic Church, which provides such services, says its religion cannot allow it to accept this prohibition; when communities and states seek all sorts of means to get around the Supreme Court's constitutionalization of abortion; when

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communities and neighborhoods seek ways to keep "adult theaters" out, or books with explicit sexual language from their school libraries. And the list can be extended.

American diversity today is well protected. Association on religious, racial, and ethnic bases flourishes widely, with the protection of the Constitution. Individual choice to express this diversity raises few problems: At the margin, law can be invoked against extreme and dangerous claims made on grounds of race, religion, or ethnicity, but this is rare. But diversity is a matter of more than individual choice. It is a matter of community, which seeks for some type of control, whether voluntary or state, to defend its values, its distinctiveness, its ideals. On such questions, where the individual may be oppressed by the group, or the group may use state power to try to oppress others, there are no simple answers. A generally divided Supreme Court is the best we can do in setting legal norms. The system works, and it has means of change when many think it is not working—as we see in present movements to amend the Constitution to make English the national language, return control of abortion to the states, or remove the Supreme Court from making decisions on school prayer.

Where diversity prevails, there will always be conflict. The hard question is how it may be held within the bounds of law and the Constitution, and how its resolutions, inevitably temporary, may find general acceptance.

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The "new science of politics" and the old art of government

DANIEL PATRICK MOYNIHAN

AS WE APPROACH the bicentennial of the Constitution, leafing through *The Federalist*, pondering the unexampled endurance of the arrangements the Founders put in place in those years, we are reminded of the role the "new science of politics"—their term—played in devising them.

It appears to me that the significance of this bicentennial will turn on the extent to which the perception is widened that the government of the United States was not fashioned out of "self-evident" Truths, but rather was the work of scholar-statesmen who had studied hard, learned much, and believed they had come upon some principles of human behavior that made possible the reintroduction of republican government nearly two millennia after Caesar had ended the experiment.

We may doubt the discussion will attain to anything like the level of discourse two centuries ago. We are short on Madisons, Hamiltons, Jays. But it is possible to hope that we may acquire a more general understanding of what it was those men were discoursing *about*. Else all will be lost to fireworks and faith healing.

The argument was about political science: Could a government be founded on scientific principles? Those who said it could won.

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The intellectual revolution of 1787

At the risk of reproach from persons more learned, let me state in summary the intellectual dilemma of that time. The victors in the Revolution could agree that no one, or not many, wanted another monarchy in line with the long melancholy succession since Rome. Yet given what Madison termed "the fugitive and turbulent existence of . . . ancient republics," who could dare to suggest that a modern republic could hope for anything better?

Madison could. And why? Because study had produced new knowledge, which could now be put to use. To cite Martin Diamond:

> This great new claim rested upon a new and aggressively more "realistic" idea of human nature. Ancient and medieval thought and practice were said to have failed disastrously by clinging to illusions regarding how men *ought* to be. Instead, the new science would take man as he actually *is*, would accept as primary in his nature the self-interestedness and passion displayed by all men everywhere and, precisely on that basis, would work out decent political solutions.

This was a declaration of intellectual independence equal to anything asserted in 1776. Until then, with but few exceptions, the whole of political thought had turned on ways to inculcate virtue in a small class that would govern. But, wrote Madison, "If men were angels, no government would be necessary." We would have to work with the material at hand. Not pretty, but something more important: predictable. Thus, men could be relied upon to be selfish; nay, rapacious. Very well: "Ambition must be made to counteract ambition." Whereupon we derive the central principle of the Constitution, the various devices which in Madison's formulation offset "by opposite and rival interests, the defect of better motives. . . ."

This is a near-mechanistic view of government, reflecting the science of the time, which consisted principally of laws of motion. (Franklin has a nice statement in which he joins the ancient and modern in comfortable proximity. Recommending a text on Newtonian mechanics, he writes: "Next to the knowledge of duty, this kind of knowledge is certainly the most useful. . . .") Shortly before the Revolution, Adams wrote of Harrington's *The Commonwealth of Oceana* that it revealed "as infallible a maxim in politics as that action and reaction are equal as in mechanics."

As for the "opposite and rival interests" that would drive this government machine, we are all familiar with the proposition of *Federalist* No. 10 that "the most common and durable source of factions has been the various and unequal distribution of property." A rough approximation of experience, one would say. But note: This

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is the *last* such source that Madison identifies. The second was "attachment to different leaders," which in time Weber would term the charismatic principle in politics. But first came "a zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice. . . ."

Madison writes of these "causes of faction" as being "sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society." Hence we ought not to ascribe any hierarchy to his principles. (Nor indeed take anything too literally in the patristic writings.) Yet it may be noted that his first principle of faction is "passion"; only by degrees does he get to real estate.

The science of politics

The Founders made a great point of their practicality, but perhaps did not sufficiently call attention to their belief that they proceeded on what they saw as a *science* of politics.

Among the elites of the nineteenth century, science steadily displaced religion as the locus of ultimate belief; theology gave way to physics in the universities and such like settings. We can speculate that the competition of political ideas in the nineteenth century might have gone better had the American system been more widely perceived as having proclaimed itself to be scientific, in the applied sense of the term. Alas, that laurel was borne off by Marx and Engels, whose wholly theoretical schema won the designation of "scientific socialism" and the fascination of three, perhaps four, generations of Europeans and others, including not a few Americans. It was a fascination that in time would convulse continents and transform civilizations.

Pitiful stuff, for the most part. It proved nothing. It forecast nothing. It failed especially to anticipate the most ominous form of "faction" in our century, which is to say ethnic conflict.

The central organizing prediction of the *Communist Manifesto* was that there would emerge a worldwide proletarian class independent "of all nationality." Workers of the World. In the words of the *Manifesto*, modern capitalism would strip the worker "of every trace of national character. Law, morality, religion, are to him so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests."

In the 1950s, Nathan Glazer and I began to study the ethnic groups of New York City, noting not just their survival from the age of immigration but also their emergence as a new political form.

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Ours has been a relatively mild experience of ethnicity; even so, it contrasted with the "liberal expectancy," to use Milton Gordon's term, that such identities would disappear altogether. More important, it contrasted utterly with the Marxist prediction (especially regarding the relation of white to black workers). In the 1970s, a seminar at the American Academy of Arts and Sciences pursued the ethnic base of conflict in severely divided societies around the world. It found the Marxist model of conflict useless. Scholars, especially Donald Horowitz, continue to add powerful specifics and generalizations. American scholarship has now falsified the central organizing principle of the Marxist forecast of the future just as there has been no collapse of profits, immiserization of the masses, and so on.

Of course, it has been events, not study, that have falsified Marx. Car bombs if you like. But it is notable that scholarship had broken out of a set of presumptions that obscured reality.

Marx and the monopoly of power

I pose this question: If events appear to have falsified Marx, why are they not also seen to have confirmed Madison? Why is Marxism not seen as just a variant on the prescientific notion of leadership by the chosen, with (as Glazer suggests) the Workers assuming the virtuous role of the Guardians? Why do we not discern on every hand the usefulness and nice shadings of Madison's tripartite model of conflict? In Beirut, Colombo, Johannesburg, Belfast, Paris, we see the purest sort of emotional, religious, racial, clannish "passion." In Teheran the cult of the leader, as previously in Rome and Berlin, Moscow and Beijing. (In Mao's time I have seen in Tian'anmen Square in Beijing effigies of hirsute Marx and Engels, stern Stalin and Mao reaching halfway to the heavens.) And in the legislatures of the United States, of Australia, of Canada, of the EEC, the primordial demands of economic interest groups on the national treasure?

The central problem of all Marxist society is the abuse of power by the State; indeed, the near monopoly of power. This in a system that forecast the "withering away" of the State! Was not this failure, this horror, ordained by the original assumption of a transcendent group altruism of a degree never achieved save in some savage assault on the interests of another group? Marxism is in this essential sense prescientific. Wishes would make it so. Madison worked from observation.

I pose the question for two reasons. The first is immediate and specific. It appears to me that as the United States settles into a protracted and ominously expensive armed standoff with the Soviet

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Union, here and there enlivened with surrogate conflicts or one-party interventions, we seem to have forgotten what the conflict is all about. The conflict, in William Pfaff's nice phrase, is about "the Soviet leaders' claim that theirs is not so much a nation as a step forward in history. . . ." This claim is false. It has been falsified.

It appears to me that as time passes and the period in which the Marxist analysis first appeared becomes more remote, the *content* of that analysis becomes ever more fuzzy to American, and, I suppose, Western leadership. (Try expounding Lenin's theory of imperialism in a Senate debate over selling subsidized wheat to the Soviet Union.) We observe that Soviet society is a disaster, but have no notion how the disaster came about; certainly no notion that it was trusting to altruism that led to such tyranny. I have served in the cabinet or subcabinet of four presidents and worked in the Senate with another two. I have not known one to be the least interested in how Soviet society *got* the way it is. This can lead to profound misreading of events in the rest of the world.

A recent editorial in *Science* by David A. Hamburg raised the issue of the convergence of ethnicity with technical developments in weapons and other modes of destruction:

> The world is now, as it has been for a long time, awash in a sea of ethnocentrism, prejudice, and violent conflict. The worldwide historical record is full of hateful and destructive indulgences based on religious, racial, and other distinctions—holy wars of one sort or another. What is new is the destructive power of our weaponry: nuclear, enhanced conventional, chemical, and biological. Moreover, the worldwide spread of technical capability, the miniaturization of weapons, the widely broadcast justifications for violence, and the upsurge of fanatical behavior are occurring in ways that can readily provide the stuff of very deadly conflicts. To be blunt, we have a rapidly growing capacity to make life everywhere absolutely miserable and disastrous.

It doesn't much help to ascribe all such trouble and sorrow to an evil empire. Better to see it as something the authors of *The Federalist* would have put under the heading of behavior not so much to be avoided, but somehow to be moderated.

These are the second grounds on which I raise the question of our continued appreciation of the intellectual constructs on which the nation was founded. The Framers of the American Constitution put in place a system of government that they believed *could* work. Not would; *could.* It was not to be assumed that the affairs of men normally go well; far less that some great transcendence was underway that would once and for all put an end to misfortune and strife. The "science of politics" indicated no such thing.

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The prophetic past and a plausible future

It may be useful at this point to ask just what was the methodology of the "science" the Founders hoped to put to use. It does not appear to me that this presents any great difficulty. They sought in an unsentimental way to observe such regularities as presented themselves from experience. They turned frequently to the "prophetic past," Chesterton's phrase that Daniel Bell used to describe his own work seeking "to identify the structural trends and structural possibilities in the society," such that plausible future outcomes can be envisioned without exactly being forecast. This seems modest stuff until one considers the outcome of some other modes of prediction.

It is the nature of such an approach to the "science of politics" that it has to be kept up to date. Ideas change; technologies change; new trends, new possibilities appear; older ones recede.

Thus, in the past two centuries, there has been a great transformation in the problematic aspects of government. Consider the bill of particulars in the Declaration of Independence. We learn that, in his zeal to oppress the people, the Tyrant George III

> has called together Legislative Bodies at Places unusual, uncomfortable, and distant from the Depository of their public Records, for the sole Purpose of fatiguing them into Compliance with his Measures.

These are not trivial matters, but, always excepting the threat of religious persecution, they seem somehow innocent given what the twentieth century has learned of tyranny. It is hard not to see the American Revolution and the Constitution that followed as the convergence of two sets of events, the one principally economic, the other mainly intellectual. The colonies had matured to the point where they did not want to be colonies any longer, which is to say plantations set down here to produce profits over there, with all the restrictions and bother of a tolerant but even so pervasive mercantilism and a tedious aristocracy. In the meantime, political thought and economic change had made monarchy seem an outmoded form of government. This was hardly a view unknown in London, but the chance for a big change occurred in Philadelphia.

Can we agree, then, that the great object of the constitutional arrangements we thereupon put in place was that the government should leave the citizen alone? Thus the thundering prohibitions of the Bill of Rights: "Congress shall make no law"; "No soldiers shall"; "no Warrant shall. . . ." Fair enough. That was the problem then. *The problem now is that citizens won't leave government alone.* They now plunder the State as the State was once thought to plun-

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der them. What happened? Many things. Start with Mr. Jefferson's purchase of Louisiana. Of a sudden the national government was *rich*. In land. A century later a central banking system made it rich in credit. In the meantime, interest groups learned the tactical advantage of moving an issue upwards in the federal system, a process described by Schattschneider. And then railroads and especially the airlines made the continent one *place*. And much more. The checks and balances of an early age seem less effective. Are we approaching this newer question with anything like the clarity and method with which the Founders approached the earlier one? I would answer no.

Critical choices

Early in the last decade, Nelson A. Rockefeller organized the Commission on Critical Choices for Americans, a panel of persons with wide interests and, not infrequently, great distinction. His purpose, as the nation approached the two-hundredth anniversary of independence, was to sort out the large questions we would have to deal with in the third century of our national life. As the name of the commission indicated, we did not set out to "make" decisions, but rather to point to decisions that would have to be made: a collective effort "to identify the structural trends and structural possibilities in the society. . . ."

It fell to me to write a paper on critical choices concerning the quality of life in America, to which I gave the title: "The Third Generation and the Third Century." This was a reference to a letter John Adams wrote Abigail in 1780. It was his duty, he said, to study "the science of government . . . more than all other sciences. . . ." (That term again.) In his view, for his time:

> The arts of legislation & administration & negotiation ought to take the place of, indeed to exclude, in a manner, all other arts. I must study politics and war, that my sons may have liberty to study mathematics and philosophy. My sons ought to study mathematics & philosophy, geography, natural history & naval architecture, navigation, commerce & agriculture, in order to give their children the right to study painting, poetry, music, architecture, statuary, tapestry & porcelain.

In that suggestive context, I went on to state that Americans faced two critical choices concerning the quality of life. The first was how much economic growth we wanted; the second how much government we wanted. My theme was that rhetorically the American polity consistently called for less government and more growth, but in practice consistently opted for less growth and more government.

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The paper was written in 1975 following the oil embargo and other convulsions that made for a year of distinctly lowered expectations, but these appeared to me more as correction than anything else.

> At mid-century a series of one-time events combined to give the United States an unprecedented economic and military position in the world. It was readily assumed that American ideology—the ideology, generally speaking of the liberal state—was equally influential and that this extraordinary hegemony would persist at least through an American Century. But of course it could not and has not.

It could not because the prestige of the liberal state, Woodrow Wilson's state, had peaked in the world in 1919 and had since declined, for all the valor and treasure expended in its defense. Similarly, patterns of development—notably in Japan and the Soviet Union—had lead to a great equalizing of economic power on the one hand and military power on the other, such that:

> A quarter century after the American Century commenced, we find ourselves in a world that might well have been extrapolated from the world of 1925; it was projections from *1950* that were misleading.

In economic matters a pattern was clear enough. The United States, as you might say, was collecting "statuary, tapestry & porcelain." The rest of the world was saving.

> An event of symbolic and substantive consequence occurred in the late 1960s when output per man-hour in the Japanese iron and steel industry outstripped that in the United States.

Of the major industrialized countries, in 1975 only those in the United Kingdom saved less of their income. Growth had slowed. To anticipate, GNP grew by 4 percent in the 1950s and the 1960s; its rate of growth then dropped below 3 percent in the 1970s, and has been barely above 2 percent in the 1980s. Only government in its redistributionist domestic mode seemed to prosper, and that is what "everyone" said they least wanted.

My paper, long on description, was short on analysis. I implied from Adams that there can be a generational movement away from preoccupation with the security of the state or the growth of the economy. I detected a measure of dissembling, if not contradiction, in our well-known aversion to Big Government. It was clear enough that individuals and groups had considerable tolerance for government outlays that benefited *them*, such that a steady general growth in the size of government was the "logical" outcome of the political bargaining process. I assumed an opportunity cost in which certain types of government outlay—military spending is one example, aid to the performing arts another—preempt a portion of growth.

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But as of 1975, the depth of this attachment to government had not been tested. What was needed was an experiment. This commenced five years later with the election of Ronald Reagan.

Reagan and the American dilemma

Previous presidents had assuredly preached the virtues of smaller government. Franklin D. Roosevelt in 1932 pledged to balance Mr. Hoover's grievously extravagant budget. But this was a kind of civic religion, avowed but not constraining. (As of 1980, current disbursements of government as a percentage of GDP in the United States came to 33.5 percent. This was not far from the 35.7 percent average for the seven largest OECD countries, half of which at any given time have assertively socialist governments.) As for greater growth, like the weather, it was much discussed but with relatively modest efforts to do much about it. The relation between greater growth in government and lesser in the economy is not all that clear, and may be a misleading dichotomy. But surely growth has been declining, although perhaps from an abnormal mid-century high.

At all events, now came a President who genuinely believed that the growth of government threatened both the society and the economy, and that radical action was necessary to save the republic. Not since 1932 was an inaugural address framed in terms of such immediate crisis calling for drastic measures—*but* positively rejecting the previous corollary, which held that if government perceived a crisis, government would have to do something about it.

> In this present crisis, government is not the solution to our problem; government is the problem.

This was much more than the boilerplate of a traditional conservative administration come to office. To the contrary, the new President was surrounded by new men with radically revisionist views of economics and government. For this group of new conservatives, capitalism had evolved during the postwar decades into an encompassing ideology. (I use the term as Edward Shils would do: a set of beliefs about social norms that it is necessary to realize in action without exception. Bolshevik Marxism was an ideology; so was National Socialism. The new ideology of capitalism, in no way brutal, much less totalitarian, was even so capable of recklessness in pursuit of an ordained ideal.)

Capitalism was seen to ensure not only a high level of production but a high level of civilization as well, the latter being by far the most important. No Cotton Mather ever preached against sin more fervently than these new men railed against subsidy, includ-

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ing subsidy to big business. No John Winthrop ever envisioned a city on a hill that excelled more in virtue than the free market of the new ideologues.

Later that inauguration day, the new President fulfilled a campaign pledge by signing a federal employee hiring freeze. He declared:

> And beyond the symbolic value of this, which is my first official act, the freeze will eventually lead to a significant reduction in the size of the Federal work force.

Big government gets bigger

Much writing will be necessary before the events that immediately preceded and followed this inaugural address can be reliably reconstructed, but the essential events, the most plausible explanation, and the early confessional record (oral and written) are by now in place. In sum: First, a strategy was devised to reduce the size of government by shrinking its financial base. Second, it soon became apparent that revenues could be cut but that outlays were "sticky." Third, in differing degrees, key members of the administration either could not grasp this or could not admit it, such that a miscalculation as to the workings of the system brought it to a condition that seems incapable of self-correction.

In general terms, in five years spending all but doubled, from just over a half a trillion dollars a year to just under a full trillion. Government employment rose by a quarter-million persons. Federal outlays reached 24 percent of GNP. But revenues hung at 19 percent. This required vast borrowing, and the debt doubled. In turn debt service trebled, becoming the third largest category of expenditure, following social insurance and defense. Debt became a central problem of the central government. Yet as even a cursory reading of *The Federalist* would have told us, government debt doesn't discourage government spending—once through the $100 billion deficit barrier, then the $200 billion barrier; once through the $1 trillion debt barrier, then the $2 trillion barrier. The politicians were free to soar! After all, no seeming harm had come of it. The effect, in David P. Calleo's phrase, was "to endow the American political economy with an almost irresistible propensity for inflation." As if in anticipation, by the second half of the decade a general loosening of restraints could be seen in the Congress, which voted ever greater agricultural subsidies (refusing in 1986 to limit payments to half a million dollars per farmer per year), launched wars on drugs, with no provision for payment, fantasized budget projections ("improved I.R.S. compliance: $2.4 billion"), and

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abandoned altogether the hallowed practice of enacting separate, annual appropriation bills.

In effect, big government was made cheap. In time the attractions of this arrangement became evident to the President as well. In the summer of his sixth year in office he was to be found in the Middle West boasting to farm audiences that: "No area of the budget, including defense, has grown as fast as our support of agriculture," adding that in "this year alone we'll spend more on farm support programs . . . than the total amount the last administration provided in all its four years." The crowd loved it, applauding his eleven-minute address fifteen times.

As for the economy, the great divide that began to open in the early 1970s separating the postwar generation from its successor, continued to widen. By 1985, median family income was about what it had been in 1970; *down* from 1973. This would be the longest stretch of "flat" income in the history of European settlement of North America. If the promise of American life, as Herbert Croly wrote at the beginning of the century, consisted first of all "of an improving popular economic condition," this promise was beginning to fade at the end of the century. As noted earlier, growth was running at half the mid-century rate. In sum, for all the *intense* desire of the Reagan administration to break out, we appear to have settled yet deeper into a pattern of more government and less growth.

Saved from our lesser motives?

What is to be learned from this latest, and to some at least, troubling experience? Thus George Will, writing as a "lapsed professor of political science":

> From the practice to the theory of democratic governments as we now have it in the United States, it is my theory that we are in a momentous year (1986), perhaps the most momentous post-war year of politics in the United States. Because it is the year in which we need to come to grips with the mismatch that threatens not only the health of our economy but the stability of democratic institutions throughout the North Atlantic community. It is the mismatch between the readiness of national governments to spend money and the reluctance of the government to tax sufficiently to pay for their bills.

As for the readiness of national governments to spend money, there is no great mystery. It is in the nature of modern society to expand the range of desirable collective goods. With his own resources Franklin could afford to purchase most of the essential scientific instruments of his age, and to keep them at home. We, by contrast,

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must own cloud chambers and space shuttles in common. And hospitals and hospices. We are not a mean people in such matters. But what do we encounter in the Reagan years? The demand for collective goods greatly exceeded the supply of money to pay for them. Whereupon we borrowed a trillion dollars from the Japanese and gave a party.

There is, moreover, an imperative which accompanies the advancement of knowledge in modern society. What do we do, for example, when we *know* how to keep people alive but it costs money? Let them die? I have been long enough in government to have known a time when issues of health hardly intruded on the budget-making process. Antibiotics had arrived, but the cost of running hospitals went mainly to clean linen. Budget examiners never had to choose how many persons with kidney failure they would let live in the next fiscal year. Now they do. It is no discredit to society that it errs on the side of the patient. This will continue.

Further, it is arguably in the nature of a mature capitalism to encourage the consumption of private goods. This produces the return on all that previous saving. The career of Henry C. Simons, a leader of the "Chicago School," bears witness to the change in mores that a sensitive observer could detect. A fierce "libertarian," and no friend of the New Deal, in 1934 Simons produced a pamphlet, "A Positive Program For Laissez-Faire: Some Proposals for a Liberal Economic Policy." His four-point program began with "Elimination of private monopoly in all its forms . . ." and ended with "Limitation upon the squandering of our resources on advertising and selling activities. . . ." Laissez-faire economics was deemed by a powerful intellect to be compatible with, indeed to require, a positive restraint in inducements to consume. But nothing could stop the dynamic of spending, including borrowing to spend, and that pattern has now reached government. As noted, the revenues of the federal government now average some 19 percent of GNP. This is a point higher than the average thirty years ago. But the mix of revenue has changed. More and more is collected from dedicated Social Security taxes that are deposited in trust funds available only for Social Security payments. By contrast, the discretionary revenue of the national government, known in budgetary language as "operating revenues," has declined from 16.3 percent of GNP in 1956 to 12.6 percent in 1986. Even though the Social Security trust funds have been in a comfortable and growing surplus, the gap between revenues and outlays more than doubled from fiscal year 1981 (2.0 percent of GNP) to fiscal year 1986 (4.5 percent of GNP).

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All this is sufficient to account for the present, protracted imbalance. Government in a general sense *ought* to be spending more as collective goods become more desirable and military goods, by any historical standard, more necessary, and as individuals *want* to spend more. These are tidal facts that will overwhelm any who defy them with an insouciant naivete. Hence both the need for taxes and the resistance to them, an impasse that is temporarily resolved by borrowing; but since so much of present borrowing is from abroad, the question of long-range stability *does* arise. A Marxist outcome is not, after all, unthinkable. The system was expected to collapse of its ordained appetites. No one expected these appetites to turn to the exploitation of government, rather than the masses, but there is a rough analogy. This wants to be repeated. Paying government less (in taxes) than the value of the goods and services it provides is a form of exploitation by the social classes that benefit—in the main, middle- and upper-income groups.

Back to virtue

Is this process ineluctable? The case could be made. Thus at mid-decade when deficits became seriously embarrassing, Congress decided to cut them back a bit largely by cutting back military spending rather than forgo other forms of consumption. The assertively pro-defense administration went along, even as it devised new modes of subsidizing voters in the farm belt. (Between fiscal years 1985 and 1986, budget authority for defense dropped for the first time since 1970-1971, which was foreseeable almost immediately after the 1981 tax cut, and, if the author may be indulged, specifically forecast in September 1981.) Will ever greater government borrowing squeeze capital out of the private market place? Will we debauch the currency, or repudiate our debt, or settle on terms the Japanese dictate? These are questions increasingly asked in Washington with an also increasing awareness that no one is listening.

Still, the events of the 1980s, once their implications are understood, could just possibly bring on a reassessment of Madisonian principles. It is now clear that "opposite and rival interests" can prevent the formation of a tyrannical majority that would use government to trample the rights of minorities. This Madison undertook, and this he achieved. But it is also clear that in the changed circumstances of the present age, a majority coalition can be assembled to exploit government. If this cannot succeed in the long run, it gives the appearance of working fine for the moment. So much the worse then for Hamilton's admonition:

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> Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions.

Which brings us back to virtue. It may be I exaggerate the crisis of the 1980s, but I think not. I believe it is now revealed that the constitutional arrangements of 1787 are not necessarily self-correcting, need not return to stability; that opposing appetites do not cancel each other out, that the "defect of better motives" can be a defect indeed. A profound prudential error was made in 1981. Persons in brief authority created a crisis which they *thought* would greatly reduce the amount of government spending, but which in fact greatly increased the amount of government borrowing. The "new science of politics" should have told them their conspiracy would not succeed. But something further ought to have deterred them. Those who are sworn to uphold and defend the Constitution of the United States against all enemies foreign and domestic do not engage in conspiracies whilst exercising authority in the name of the President. Those in such position do not withhold facts and misrepresent facts whilst professing professionalism and candor. There was a failure, as James Q. Wilson would put it, of character. In time this failure extended well beyond a small circle in the executive office of the President.

And thus we return to the Declaration after all.

> And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

The "science of politics" can make the demands of virtue bearable but can never substitute for them. The 1980s produced not a political crisis but an ethical one. At some level, official Washington has not wanted to know what happened. To do so would lead, or so I think, to Will's assessment. And then what do you *do*? If you are not seriously prepared to do something, it is perhaps best not to know that you ought to. This is a form of cowardice and a defect indeed of virtue.

It comes to this. The psychological realism of the Founders predicted much and served us well in a time of a small and distant national government. It is not clear that this is still the case. Something extra is required in an age when the costs of wholly self-interested behavior can be so great because government is so large.

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Does the separation of powers still work?

JAMES Q. WILSON

IF ONE IS ASKED to explain why the American government acts as it does with respect to almost any policy issue, the chances are probably eight in ten that the right answer is the separation of powers. The existence of three separate institutions with independent constitutional standing and, in two cases, distinct electoral constituencies is what distinguishes American government from parliamentary democracies. The separation of powers is the source of the enormous influence that Congress exercises over both the broad outlines and minute details of public policy, an influence that has led Daniel Patrick Moynihan to remark that the United States is the only major government with a legislative branch and that leads many European observers to doubt that this country is really governed at all. The separation of powers is also at the root of the courts' authority to declare presidential and congressional acts unconstitutional and thus is a major cause of one kind of judicial activism.

If one is asked what is wrong with American government, the odds are great—maybe not eight in ten, but better than one in two—that the reply will refer to some aspect of our politics that can be explained by the separation of powers: "The president cannot negotiate for the United States on delicate foreign policy matters." "Congress meddles in the work of bureaucratic agencies." "There are too many government leaks to the press." "The Pentagon is not

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under strong, unified management." "There are too many patronage (i.e., political) appointees in government agencies." "There are too few policy-oriented (i.e., political) appointees in government agencies."

If one makes a list of the most frequently proposed alterations in our constitutional arrangements, the odds are high that these proposals will call for a reduction in the separation of powers: "Let the president put some members of Congress in his cabinet." "Have the president and members of Congress who are from the president's party run as a team." "Allow the president to dissolve Congress." "Allow Congress to call for a special presidential election." "Curb the power of judicial review."

If one listens to the reflections of presidents and their aides, no matter whether they are liberals or conservatives, the most common complaint is that the president does not have enough power. Roosevelt, Truman, Eisenhower, Kennedy, Nixon, Carter, Reagan: All have remarked on how little the president can do compared to what the public expects him to do. Roosevelt, Truman, and Nixon appointed commissions (the President's Commission on Administrative Management [PCAM], the Hoover Commission, and the Ash Commission) to advise them on how best to extend their control over the bureaucracy; Nixon (like many presidents before him) tried to impound funds that Congress had ordered him to spend; Carter made a largely futile effort to weaken congressional control over the bureaucracy; Ford and Reagan have argued that the War Powers Act, which requires congressional participation in presidential decisions to commit armed forces, is unconstitutional. And on and on.

It is as if almost everybody were expressing devotion to the Constitution in general but not to the central principle on which it rests. Does anybody like the separation of powers? Can anything good be said for it?

The separation of powers in the courts

There is one group devoted to the principle: the Supreme Court. It may be activist in interpreting the Bill of Rights, but on the separation of powers it has adopted the most literal readings of the Constitution. In 1926, it held that Congress cannot deny to the president the right to remove an executive official he has appointed[1] (nine years later the Court modified that ruling to allow congressional restrictions on presidential appointments to independent reg-

[1] Myers v. United States, 272 U.S. 52 (1926).

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ulatory commissions).[2] In 1975, it held that President Nixon could not impound (i.e., fail to spend) funds appropriated by Congress.[3] The following year it decided that Congress could not appoint members of the Federal Election Commission.[4] In 1983, it overturned the legislative veto, a procedure whereby Congress had granted discretionary authority to the president or subordinate officials subject to the right of Congress to block a proposed exercise of that authority by adopting a resolution.[5] Three years later it struck down a part of the Gramm-Rudman deficit reduction act because the across-the-board spending reductions mandated by the act were, under certain circumstances, to be executed by the Comptroller General. It seems that, because the Comptroller General can be removed by Congress, he is subservient to Congress and so cannot exercise "executive powers."[6]

From time to time, the Court recognizes that the Founders never intended to create a government based on a strict separation of powers but rather one based, in the words of Richard E. Neustadt, on separate institutions sharing powers. But whenever the Court finds a statement specifying how those powers are to be shared, it tends to give to those words the most narrow construction. For example, its objection to the legislative veto was that such congressional resolutions have the force of law even though they are not signed by the president (never mind that the president may have signed a law creating the system of legislative vetoes); a law, to be a law, "shall be presented to the President of the United States" for his signature or veto as required by the language of Article I. And in the Gramm-Rudman case, the Court was unimpressed by the fact that the Comptroller General, since the creation of the post in 1921, has been a largely nonpartisan and neutral officer who serves a fifteen-year term and who can only be removed for cause and with the assent of both the president and Congress.

It is hard to find an area of constitutional law in which the Court has been as nonactivist as with respect to the separation of powers. The uncharitable may argue that the Court's faithfulness to text on this issue is necessary to empower it to be activist on other issues, for without strict adherence to the doctrine of separated powers the Court itself might not be able to assert the authority, nowhere mentioned in the Constitution, to declare acts of Congress

[2] Humphrey's Executor v. United States, 295 U.S. 602 (1935).
[3] Train v. City of New York, 420 U.S. 35 (1975).
[4] Buckley v. Valeo, 424 U.S. 1 (1976).
[5] Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983).
[6] Bowsher v. Synar, 106 S. Ct. 3181 (1986).

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unconstitutional. Perhaps; certainly *Marbury* v. *Madison* (1803), the first case to announce the Court's power to invalidate acts of Congress, was also the first case to argue that Congress had violated the separation of powers (by attempting to enlarge the original jurisdiction of the Court).

Whatever the Court's motives, its words echo hollowly in the halls of contemporary political debate. Scarcely any other voice is raised in praise of the separation of powers, except in the most abstract sense. Separated powers are a fine idea, it would seem, except when they prevent me from having my way.

Of course, it was precisely to prevent officials from having their way that powers were separated in the first place. As Chief Justice Burger said in the Court's opinion in the Gramm-Rudman case, the institutions of government were deliberately arranged to create a system that "produces conflicts, confusion, and discordance." Few presidents probably cared for that arrangement very much, but their complaints were of little moment during the century and a half or so when the national government played a minor role in public affairs (except in wartime, and then the Court, with only a few exceptions, allowed the president quite sweeping powers free of any but the most essential congressional checks). Once the national government began—or tried to begin—to play a large role, presidents, and people who looked to the president for action, visibly and audibly chafed under their constitutional restraints.

The case against the separation of powers

There have always been two distinct, though often intertwined, strands in the case against the separation of powers. One is the liberal case: The federal government should play a large and active role in human affairs by supplying services, reducing economic inequality, and catering to the demands of those who find themselves at a disadvantage in the marketplace. During most of this century, presidents have been more sensitive to the urban and industrial constituencies who make these demands than has Congress. Therefore, the powers of the president should be enlarged and those of Congress (or those parts of Congress that are "obstructionist") should be reduced. From this perspective, it made sense to weaken the authority of congressional committees, or at least the committees headed by powerful conservatives (such as the House Rules Committee under the leadership of the legendary Judge Howard Smith of Virginia). It also made sense to call, as did James MacGregor Burns and E. E. Schattschneider, for strong political parties headed

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by the president, or presidential candidates, that would be able to command the loyalty of party members in Congress to the president's program and supplant the loyalty those members gave to committee chairmen. When Burns wrote of the "deadlock of democracy," he was writing of the political barriers to the enactment of a liberal agenda.

The other case is the rationalist one. Whether policies are liberal or conservative, they should be made decisively, efficiently, and on the basis of comprehensive principles. The public interest was not well served by simply adding up individual preferences into a "patchwork" or "crazy quilt" of inconsistent programs administered in "wasteful" ways by "duplicative" agencies. The public interest was better served by having a unitary view of what was good for the nation "as a whole." Only a single official could design and propose an internally consistent set of policies based on some overriding principle. In our system that person is the president. Therefore, the president should have more power. In this view, it made sense to give the president firmer control over the bureaucracy, equip him with sufficient staff to develop programs and oversee their administration, empower him to recognize government agencies, and strengthen his hand in dealing with Congress. In theory, a rationalized national government could serve either liberal ends (by enacting broad welfare and regulatory programs) or conservative ones (by cutting waste, reducing spending, and simplifying or minimizing regulation). The rationalist view especially emphasized the foreign policy role of the president. With Tocqueville, it noted that diplomacy is especially difficult in a democracy owing to the need for secrecy, speed, and unity of action, all hampered by the fact that the president must share power with Congress.

The existence of two arguments against checks and balances helps explain why a liberal, Harry Truman, could appoint a conservative, Herbert Hoover, to recommend ways of improving government; why presidents of all stripes have been able to make plausible cases in favor of enhancing their powers; and why movements for constitutional "reform" are able to recruit conservative businessmen as well as liberal academics into their ranks.

These reform movements, though they have helped change aspects of the presidency, have not had a fundamental impact on the separation of powers. To the extent the separation of powers has been altered, it has been the result of events more than plans, events that helped liberals more than rationalists.

Liberals achieved the enactment of a large part of their agenda as a consequence of two windows of opportunity that opened thirty

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years apart. The Great Depression enabled an overwhelming Democratic majority in Congress, aided (after 1935) by a slim but solid majority on the Supreme Court, to lay the foundations for the modern welfare state. In 1965, a landslide electoral victory by Lyndon Johnson and the arrival of a liberal majority in both houses of Congress set the stage for a vast expansion of the welfare state and the enactment of dozens of consumer- and environmental-protection laws.

Rationalists made some gains in wartime, when the president gained enhanced authority over the government and the economy, but most of these gains faded with the return to peace. Otherwise, rationalists have had to plug away at small, painfully won changes—the passage of the Budget and Accounting Act in 1921 (that created the Bureau of the Budget and the General Accounting Office), the acquisition by the president in 1935 of the power to reorganize by executive order (subject to a legislative veto), the expansion of the White House office pursuant to the recommendations of the PCAM, the passage of the Legislative Reorganization Act of 1946 that reduced the number of standing committees of Congress and laid the groundwork for the growth in congressional staff, and the creation in 1978 of the Senior Executive Service (SES) to permit more flexible use of high-level bureaucrats. Some of these changes, especially the creation of the Bureau of the Budget and the attendant growth of presidential control over the budget and the legislative agenda, were of great moment, but many proved to be short-lived or chimerical gains. The power to reorganize expired, and now that the legislative veto has been deemed unconstitutional, it probably cannot be revived. The White House staff has grown so much that it has become a bureaucratic problem in its own right. The reduction in the number of congressional committees was quickly followed by the growth in the number of subcommittees, leaving authority in Congress at least as decentralized as it had once been. The Senior Executive Service has been a disappointment: Not many top-level bureaucrats moved from one agency to another, rarely was a SES member fired, and the availability of cash bonuses did not seem to enhance performance.

Moreover, the very success of the liberals in supplying the agenda for and expanding the role of the federal government was achieved at the cost of major setbacks for the rationalist cause. The government became big before the president became institutionally (as opposed to personally) powerful. What Roosevelt and Johnson created, their successors could not easily manage. Moreover, the liberal gains in the late 1960s and early 1970s were accompanied by a radical decentralization of Congress. Liberal majorities in the House

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and Senate confronted the conservatives holding power as chairmen of certain key committees, such as the House Rules Committee and the House Ways and Means Committee. To move their agenda onto the floor where its passage was assured, liberals had to unseat committee chairmen they regarded as obstructionist, enhance the power of individual members at the expense of committee chairmen, modify the rules to make it harder to bottle up legislation in committee, and (in the Senate) alter, slightly, the cloture rule to reduce the threat of a filibuster. The effect of these changes, chiefly wrought by the House Democratic caucus, was to increase the power of individual congressmen and reduce the power of congressional leaders.

Politically, if not constitutionally, powers became more rather than less separated. The president now was held responsible for *every imaginable domestic and foreign problem, but his capacity to* make a systematic response to these problems was reduced by two changes: The growth in the size of the government had contributed to the growth in the number and variety of interest groups that sought to block presidential initiatives, and the decentralization of Congress reduced the president's ability to negotiate with a handful of congressional leaders who could help build legislative majorities.

Critics of the separation of powers could have made one of two responses to this state of affairs. The rationalist might have argued for a reduction in the size and scope of the federal government on the grounds that our policy commitments now exceeded our capacity to manage them. Or the rationalist could have reaffirmed his alliance with the liberals by arguing for more profound and sweeping changes—necessarily involving constitutional revision—in order to reduce the separation of powers sufficiently to permit the president to direct affairs in the new order. By and large, rationalists have chosen the second course, and so we have such groups as the Committee on the Constitutional System (CCS), led by Lloyd Cutler, C. Douglas Dillon, and Senator Nancy Landon Kassebaum. Thirty or forty years ago, I surmise, such a group would have been arguing for a stronger Bureau of the Budget, a bigger White House staff, a more effective civil service system, fewer congressional committees, and (perhaps) stronger political parties. Most of those things happened, but now they seem inadequate to the task of directing a vast federal government. And so the call has gone out for constitutional reform.

To the CCS and its supporters, the need for fundamental change is almost self-evident. Perhaps that is why so little of their writing is devoted to making the case for change. The most important essay,

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Lloyd Cutler's "To Form a Government,"[7] is almost the only systematic effort to explain why we need to modify the separation of powers. Given their premises, of course, the need for change *is* virtually self-evident. To them, the public interest is a discoverable set of principles and goals from which right actions can be inferred. The means to achieve these ends must be comprehensively and efficiently related to those ends. This is more easily done by one mind than by 535, by an official responsible to a national electorate than by one beholden to many small electorates, and by a person able to carry out his policies subject to the check of electoral defeat than by one who cannot carry out any policies at all without first overcoming countless checks by subcommittees, committees, interest groups, and houses of Congress. The rationalist position, like rationality itself, seems to require little defense.

The intent of the Framers

But of course the Framers of the Constitution were not trying to create a government that would discern national goals and serve them efficiently and with dispatch; they were trying to create a limited government that would serve only those goals that could survive a process of consultation and bargaining designed to prevent the mischief of factions and the tyranny of passionate majorities or ambitious politicians. The CCS and its allies understand this but argue that conditions have changed since 1787: Public affairs today are more complex, interdependent, and fraught with peril than they were in the nineteenth century, and so we must modify our governing arrangements in order to meet these new challenges.

It is not difficult, of course, to produce a litany of difficulties facing the nation: a large budget and trade deficit, the threat of nuclear war, a complex array of international commitments, an economy painfully adjusting to new kinds of international competition, the cancer of crime and drug abuse, and so on. But it is not clear that these "new realities" are fundamentally different from the kinds of problems faced by Washington's first administration and it is certainly far from clear that they constitute a case for constitutional change.

The first administrations had to salvage a disrupted economy, pay off or otherwise settle a crushing war debt funded by worthless paper, worry about the presence of hostile British forces in Canada and a British navy at sea, cope with French control of the Mississippi

[7] Lloyd N. Cutler, "To Form a Government," *Foreign Affairs*, Fall 1980, pp. 126-143.

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River valley and Spanish control of Florida, put down a rebellion of Pennsylvania farmers protesting the tax on whiskey, reconcile the deep ideological divisions stirred up by the French Revolution, make legitimate the government in the eyes of skeptical Anti-Federalists and Jeffersonian Democrats, do battle with Indians waging war on the periphery of the new republic, and settle the hotly contested Jefferson-Adams presidential race by going to thirty-six ballots in the House of Representatives. Hardly simple times; hardly an easy test for the new constitutional order. It survived.

Today, the case for constitutional change is being made to a nation prosperous and at peace whose political institutions enjoy unquestioned legitimacy. Decision making is as contentious and protracted now as it was two hundred years ago, but under circumstances that are far more conducive to success and popular support than once was the case. In 1986, one can only be amused to reread the 1974 essay by Charles Hardin on why our government was then in crisis and why only major "constitutional surgery" could correct it. Watergate, the supposedly "imperial presidency," and popular distrust of government were the crisis; the cure required these changes: electing the president and Congress for coterminous four-year terms, abolishing the office of vice president, allowing Congress to remove a president by a vote of no confidence, giving the president an automatic majority in the House of Representatives, and so on. Of course, the "crisis" ended without any of these "cures." Watergate was handled by the normal constitutional procedures—congressional investigations, criminal trials, and the prospect of impeachment—and the presidency and the president are once again in high repute.

Real and imagined problems

But generalities cannot settle the matter. Let us look at the specific ways in which the constitutional system is allegedly defective: the deficit, economic policy, and foreign affairs.

1) *The deficit.* C. Douglas Dillon has argued for a parliamentary democracy because, unlike our system, it would more effectively address the problem of the deficit. There are two things wrong with his argument. The first is that there is no evidence at all that the deficit is a consequence of the separation of powers. At the President's request, taxes were cut. At the President's request, defense spending was increased. At the President's request, the Social Security system was preserved intact, with minor adjustments in tax and benefit levels. At the President's request, budgets were submitted that were not in balance. There are important differences between

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what the President has requested and Congress has approved with respect to many spending bills, but all of these differences, if resolved in the president's favor, would not produce a balanced budget. The deficit would be somewhat less, but not substantially so, if all presidential requests were automatically enacted by a subservient Congress. If Mr. Dillon is worried about the deficit, he need not vote for constitutional reform; he need only have voted against Mr. Reagan.

The second difficulty with the Dillon argument is immediately apparent when we examine the budgets of parliamentary democracies. There are important conceptual problems in comparing deficits across nations—consider, for example, the problem of comparing governments that do and do not own major industries, or that of comparing deficits between high- and low-inflation countries. Taking into account all these problems, Vito Tanzi of the International Monetary Fund, using data from the Organization for Economic Cooperation and Development (OECD), produces estimates for the 1984 deficit, measured in percentage of gross national product, that are arranged from high to low in Table I:

Table I. Deficit Comparison Across Nations for 1984[a]

Country	*Percentage of GNP*
Italy	12.4
Ireland	12.3
Belgium	10.3
Greece	9.8
Denmark	6.0
Netherlands	5.9
Spain	5.7
Canada	5.3
Sweden	3.5
UNITED STATES	3.1
United Kingdom	2.8
Japan	2.3
Germany	1.4
Norway	−2.4

[a] *Source:* Vito Tanzi, "The Deficit Experience in Industrial Countries," in Phillip Cagan, ed., *The Economy in Deficit* (Washington, D.C.: American Enterprise Institute, 1985), pp. 94-95.

Every nation on this list with a fiscal deficit except ours has a parliamentary democracy; that is to say, it is not governed in accordance with the separation of powers. Japan, Germany, and Norway have deficits smaller than ours; Italy, Ireland, Belgium, Greece, Denmark, the Netherlands, Spain, and Canada have much larger ones; France, Sweden, and the United Kingdom are about on a par with us. The safest conclusion that can be drawn from this list is that form of government has no effect on the size of the deficit.

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A bolder inference, for which a case might be made, is that parliamentary regimes, by concentrating power in the hands of the executive, facilitate the adoption of new spending measures designed to satisfy the constituencies that brought the prime minister and his party into power. David Cameron has shown, for example, that government spending as a percentage of the gross domestic product and the rate of increase in that spending over the last twenty years or so has been higher in Belgium, France, Italy, the Netherlands, Norway, Sweden, and West Germany than in the United States. Only in Spain and Japan did the government spend less, and the rate of increase in spending in these countries was faster than it was in this country.[8] Moreover, much (but not all) of the difference between high- and low-spending nations is associated with leftist party control of the government. In any nation, liberals can win elections; in the United States, it is harder for them (or for conservatives) thereby to win control of the government. Parliamentary democracies may have the ability to make the "hard choices" the rationalists want, but it is far from clear they have any desire to do so. What is clear is that it is easier for them to make the easy choices.

2) *Economic policy*. We are constantly reminded that we live in an interdependent world undergoing rapid technological and economic change. Those who remind us of this situation claim that the United States does not respond to that change very well. We save and invest too little. We import too much. We allow jobs to be destroyed by Asian competitors. We fail to rebuild our smokestack industries. We regulate in cumbersome ways. We have too many small farmers. Our legal system imposes costly delays.

The implication of these criticisms is that there is a correct economic policy that a bold president would implement. (Among my students at UCLA, there is a widespread belief that a sufficiently bold president would turn out to be either Lee Iaccoca or Peter Ueberroth.) If the right president can be found, then he should be given the freedom to design and carry out his economic policy. If he fails, the voters will punish him at the next election; if he succeeds, the voters will reward him (unless, of course, constitutional reformers have succeeded in limiting him to a single six-year term).

In support of the virtues of greater decisiveness and comprehensiveness in economic policymaking, one can point to the fact that many other industrial nations have been more successful than the United States in taxing consumption (for example, the value added

[8] David R. Cameron, "Does Government Cause Inflation? Taxes, Spending, and Deficits," in Leon N. Lindberg and Charles S. Maier, eds., *The Politics of Inflation and Economic Stagflation* (Washington, D.C.: Brookings Institution, 1985), pp. 230-232.

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tax) and rewarding investment (for example, by not taxing capital gains). There is also evidence from several studies of other countries that their system of environmental regulation is less adversarial and less legalistic but just as effective as that in the United States.[9]

These are weighty arguments, but it is not clear they weigh in favor of movement toward a parliamentary regime. First, it is not obvious what economic policy is correct. Of course, advocates of a rationalist governing system will respond that, though no one knows for certain what policies will work, at least a strong, executive-centered system will permit us to try a given policy. Their view is that a yes-or-no referendum by the public is a better check on economic policymaking than a detailed scrutiny and amendment by Congress. I am not convinced. We may make new economic policy in half-hearted steps or tolerate inconsistent economic programs, but we thereby hedge our bets and avoid the extreme swings in policy that are characteristic of some other regimes. Britain nationalized, denationalized, renationalized, and then denationalized again several of its basic industries. France appears on the verge of doing the same.

Second, it is increasingly implausible to use "deadlock" as a word to describe economic policymaking in America. After many decades of increased regulation of prices and conditions of entry in such industries as domestic banking, aviation, securities trading, and telecommunications, a more or less measured and careful process of deregulation began that, though far from constituting a revolution, has revealed this nation's capacity for learning and self-correction. After decades during which Democrats demanded steeply progressive tax rates and Republicans went along in return for extensive deductions, the president and Congress renegotiated the terms of that old compact in favor of a system with less steep rates and fewer loopholes.

Third, the adversarial and legalistic nature of economic regulation here, while indisputable, reflects many factors in addition to the separation of powers. No doubt the separation of powers intensifies the adversarial nature of our regulatory system by empowering congressional critics of current regulatory law and enabling the courts to play a large role in reviewing and reversing regulatory decisions. But we live in an adversarial culture, the product of centuries devoted to defining politics as a struggle over rights. We are deeply imbued with a populist suspicion of the sort of behind-the-

[9] David Vogel, *National Styles of Regulation* (Ithaca, N.Y.: Cornell University Press, 1986); Steven J. Kelman, *Regulating America, Regulating Sweden* (Cambridge, Mass.: MIT Press, 1981).

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scenes negotiations that characterize regulatory policymaking in England and Sweden. The centralized nature of political and economic life abroad facilitates the settlement of issues by negotiations among peak associations, whereas here the decentralized political order and the more competitive economic one make it impossible to commit either the government or economic actors to the syndicalist pattern of decision making so often seen in Europe.

3) *Foreign policy.* Lloyd Cutler makes much of President Carter's inability to get the Senate to ratify the SALT II treaty in 1979. A president able to "form a government" would have been able to commit this country to such a treaty. Cutler points out that no prime minister is faced with the need to obtain senatorial ratification of treaties.

True enough. But one moment: The Senate rarely fails to ratify a treaty. It has approved something approaching a thousand treaties and turned down about twenty and just five in this century, of which only the Treaty of Versailles, establishing the League of Nations, was an important defeat. Of course, it can talk a treaty to death, as it almost did with SALT II (the *coup de grace* was not Senate but Soviet behavior—the USSR invaded Afghanistan before the treaty could come to a vote). But in general the Senate tends to go along.

The crucial question should not be whether the president should have more power over the Senate but whether the treaties that failed ratification were in the public interest. Just before describing Carter's problems with SALT II, Cutler speaks of the need for "making those decisions we all know must be made." Was SALT II such a decision? If so, Cutler leaves the argument unstated. Strong arguments can be and were made against it. Many thoughtful people believed that it was a bad treaty. The notion that ratification should be made easier so that the real check on the success of the president's policy is public reaction at the next election is chimerical: People rarely, if ever, vote for or against presidents because of the treaties they have signed, for the obvious reason that, barring some dramatic incident, the people have no way of knowing whether the treaty was a good or bad idea.

Foreign policy is more than treaties, of course. It is not hard to think of circumstances in which one would want the president to have a freer hand. It is not hard to think of ways of giving him a freer hand. If constitutional reformers are so keen on supplying a freer hand, it is curious that they spend so much time discussing quasi-parliamentary procedures and so little time discussing the vir-

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tues of repealing the War Powers Act, modifying congressional supervision of the Central Intelligence Agency, and eliminating the legislative veto over arms sales, none of which requires a constitutional amendment. One wonders whether the rationalists are really rationalists and not actually liberals in rationalist clothing, eager to have a president powerful enough to sign arms-control and nuclear-test-ban agreements but not strong enough to commit troops to Grenada or Lebanon or provide aid to anti-Marxist rebels in Central America or Angola.

Still, a strong case can be made that in negotiating with foreign powers, the president of the United States is in an awkward position, not simply or even mainly because he must get the Senate to ratify his treaties, but because he must publicly negotiate simultaneously with both Congress (and congressionally amplified domestic pressures) and the foreign power. When President Nixon was negotiating with the North Vietnamese to end the war in Southeast Asia, he had to make concessions to both Congress and the enemy, reducing any incentive the enemy had to make concessions in return. As President Reagan negotiates with the Soviet Union over arms control, it would be difficult for him to make credible and useful offers to constrain deployment of antisatellite weapons or the "Star Wars" defense system if Congress, in advance of the negotiations, places, on its own initiative, constraints on these weapons. It is hard to play poker if someone on your side frequently proclaims that you will give away certain chips regardless of what your opponent may do.

But it is unlikely that any of the most frequently discussed constitutional changes would materially improve the president's bargaining position. Putting members of Congress in the cabinet, letting the president serve a six-year term, or having the president and House members run as a team would leave the president and Congress in essentially the same relationship they are now: rivals for control over the direction of foreign policy.

The unwritten constitution

There are two fundamental arguments for a constitutional system of separate institutions sharing powers: It helps preserve liberty and it slows the pace of political change. Those arguments are as valid today as they were in 1787. Individual liberties are more secure when the actions of one part of the national government can be checked by, or appealed to, another. Political change is slower, and so the growth of new programs and public spending is slower,

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when any new proposal must survive the political obstacle course of bureaus, subcommittees, committees, and houses of Congress.

Rationalists may view the delays, confusion, and inconsistencies produced by this system as costly, as of course they are. But they should not assume that if the costs were reduced or eliminated by reducing or eliminating the separation of powers, the advantages of this system would remain. Even Lloyd Cutler recognizes that a congressional system has some advantages over a parliamentary one; for one thing, the former permits investigations of executive misconduct that the latter does not. Watergate comes quickly to mind, but there are many other examples—Teapot Dome, defense procurement scandals, civil rights abuses, and organized crime. On a smaller scale, one cannot complain to one's congressman about an injustice and have much hope of redress if the power of Congress has been reduced.

Liberal proponents of reducing the separation of powers know full well that it impedes political change and that, I believe, is the major reason they favor such a reduction. At one time they might have worried that an executive-dominated system would threaten liberty, but they have become accustomed (and with good reason) to looking to the courts for the protection of personal liberty, and so this worry no longer seems as serious. That it is a larger state they wish and not simply a more efficient one is evident from the fact that, whereas they have often been eager to curb the independence of Congress, they have never (since 1935) been eager to curb the independence of the courts. Yet judicial independence is probably as much a source of delays, confusion, and uncertainty as is congressional independence (consider how court review affects the operation of public schools, the management of prisons, or the settlement of personal injury claims). If over the last half century the courts had been under the control of conservative rather than liberal activists (or even under the control of conservatives, period), I imagine that liberal enthusiasm for constitutional reforms would not stop at the courthouse door.

Defending the principle of separation of powers is not the same as defending the practices that have developed around these constitutional principles. Don K. Price, like me, argues against constitutional change but argues in favor of changes in the "unwritten constitution," those customs and arrangements that allow a government of separate institutions to work at all.[10]

[10] Don K. Price, *America's Unwritten Constitution* (Baton Rouge, La.: Louisiana State University Press, 1983).

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The most important provision of the unwritten constitution is the internal organization and procedures of Congress. The Constitution requires that the House and the Senate as a whole enact legislation, but it is silent on how many additional "enactments" must occur within the House and the Senate. At one time, there were virtually no congressional committees and no chairmen, at another time there were many powerful chairmen; at one time members of the House had great autonomy, at another time they yielded immense authority to the Speaker; at one time the House Rules Committee dominated the legislative process, at another time it played a smaller role; at one time seniority alone determined who should be chairman, at another time the party caucus influenced the choice of chairmen.

Leadership in the states

The variety of unwritten constitutions that can exist within a system of separate institutions is revealed by the experience of American state legislatures. No one can understand the politics of California by reading its constitution, because nowhere does it mention the extraordinary power exercised by the speaker of the assembly. Willie Brown is not elected speaker by the voters of the state, yet next to Governor George Deukmejian he is the most powerful official in that state. People accustomed to think of a lieutenant governor as a political nobody would not be prepared for the extraordinary power enjoyed by the lieutenant governor of Texas, who not only presides over the state senate but chooses the members and chairmen of its committees. If you went to Mississippi to do business with the state, you might think it important to meet the governor, but most people there will tell you that it is more important to meet with the speaker of the House. Like his counterparts in California and several other states, Speaker C. B. "Buddie" Newman of Mississippi can control the composition and leadership of key committees and determine the fate of much legislation.

The Congress of the United States, by contrast, is extremely decentralized and individualized. Speaker Sam Rayburn during the 1950s was not nearly as powerful as Speaker Thomas Reed in the 1890s, but he was far more powerful than Speaker Tip O'Neill in the 1980s. Congress, especially the House, has chosen to have weak leadership; in principle it could choose to have strong leadership. The methods are neither obscure nor unconstitutional: vest in the speaker or the majority leader the power to select and remove committee chairmen; change campaign finance laws so that the House

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and Senate campaign committees could raise and spend large sums of money on behalf of individual candidates and place control of these entities firmly in the hands of the speaker or majority leader; reduce the ability of individual members to create their own political action committees or to receive funds directly from the political action committees of others; and strengthen the power of the speaker or the majority leader to choose which committees shall consider bills and which bills will come to the floor for a vote. All of these things are done in state governments operating under essentially the same separation-of-powers principles as shape the national government.

It is not entirely clear why state legislatures (including such progressive ones as those in California, Massachusetts, and New York) should have resisted the tides of individualization and decentralization that have engulfed Congress. But two things are clear: First, the weakening of congressional leadership has been accomplished chiefly at the initiative of liberals who regarded strong leaders and chairmen as a barrier to liberal policies. Second, that weakening has reduced, or at least vastly complicated, the ability of the president to negotiate effectively with Congress. If one wishes to preserve the system of checks and balances but facilitate the process of bargaining and reciprocity essential to its operation, it makes more sense to enable the president to negotiate with four or five congressional leaders who can make commitments than to require him (or his legislative affairs staff) to negotiate with scores or even hundreds of individual members, none of whom can commit anyone but himself.

I am not optimistic that Congress will restore strong leadership. As I have written elsewhere,[11] there are very few examples in American history of people who possess certain powers voting to give them up or of people deciding they favored less democracy rather than more. And even if congressional leadership is strengthened, the president will certainly not be able to dominate the leaders who emerge. But it is in this area of the unwritten constitution that remedies for the defects of the separation of powers must be found. There are no constitutional remedies short of the abolition of the principle itself, and that is a price that two hundred years of successful constitutional government should have taught us is too high to pay.

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[11] James Q. Wilson, "Political Parties and the Separation of Powers," in Robert A. Goldwin and Art Kaufman, eds., *Separation of Powers—Does It Still Work?* (Washington, D.C.: American Enterprise Institute, 1986), pp. 18–37.

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Constitutional government: the soul of modern democracy

HARVEY C. MANSFIELD, JR.

ALTHOUGH modern democracy is unhappy with the word "soul," it has one nonetheless; and its soul is not healthy today. The disease is widely known as "dependency," the popular disposition, denounced mainly by conservatives, to depend on others, especially government, to secure one's well-being. This disease extends beyond welfare dependency in the narrow sense to include all who depend on their entitlements in a society that no longer requires or encourages (and often does not permit) free choice. The liberal version of dependency, heard a generation ago, was "apathy" toward social problems; and the radical or neo-Marxist term has been "false consciousness" distracting the people from revolution.

Clearly a similar concern exists in diverse quarters, but defined diversely in partisan modes. One might be tempted to object that the complaints cancel each other out because each is aimed at the others. One might add that to be concerned with one's health is a sign of health rather than of dependency, apathy, or false consciousness. But these objections to the diagnosis are complacent. If nothing else, the authority of Tocqueville, whose word is worth far more than our perceptions (because it is based on his), should prompt us to fear the onset of "individualism," as he called the dis-

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ease.[1] The similarity in the complaints we hear today suggests that each may have hold of an important truth in its own way, though not necessarily with equal discernment. And the healthiness of concern for one's health depends on the cure one chooses.

To understand this disease of modern democracy, we should begin by comparing it to the evil that the American Founders feared from popular government when they made the Constitution. We see quickly that whereas we fear a people with too little spirit and activity, they feared one with too much spirit and aggressiveness. Whereas we fear an apathetic or dependent majority that does not know how to claim its rights or to exercise them, they feared an overbearing majority faction—Madison's famous argument in *Federalist* No. 10 leaps to mind. The Founders' remedy against an overactive people was, to describe it most generally, a constitution that puts government at a distance from the people. By contrast to previous republics outside America, this one was entirely representative; the people could not act themselves but could only elect others to act in their place. These representatives (in the federal government) had longer terms of office than were usual even in the American states. And since within the government the Founders were most wary of "legislative usurpation" from the branch closest to the people, they built a strong executive and an independent judiciary to stand up against the people. These two branches were said to be *derived* from the people and to be acting in the *interest* of the people, but their strength, it was thought, would not be exercised at the *behest* of the people. On the contrary, these two essentially nonrepublican institutions, whose democratic legitimacy we now take for granted, were originally intended to oppose the momentary inclinations of the people. This popular government would not "lead" the people ("leadership" is mostly used pejoratively in *The Federalist*) so much as "control" it. Imagine an official today who offered his excellent "control" of the people as an inducement to his reelection. And yet, when one reflects on it, what is so wrong with a people controlling itself through its government? In the choice between government leadership and government control, we note that a people or an individual may achieve *self*-control, but can only *be led* by someone else.

[1] "Individualism is a calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to his taste, he gladly leaves the greater society to look after itself." Tocqueville, *Democracy in America*, G. Lawrence trans. (New York: Doubleday Anchor, 1969), II.2.2, p. 506.

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Or must we accept that leadership and control are necessarily in conflict? According to the argument so far, the Constitution would seem to be precisely a combination of the two in which the people governs itself by electing leaders to control it. The Constitution establishes a limited government not only in the sense that the people has set limits to its scope, but also because in establishing it, the people set limits on itself. Ratifying the Constitution was a choice of the people to set limits on its choice. For if the American people had merely wanted a government to serve it as an instrument, it could have done without a constitution and have set up a system of mandates and commissions. But the essential character of the American Constitution is that while all its parts are *derived* from the people, none of them *is* the people. Indeed, the people that ratified the Constitution in 1787-88, the sovereign people, has disappeared from view except for an occasional appearance to make an amendment (which is not a fully sovereign act because amendments are made under the procedures of the Constitution). The sovereign people has been replaced by the constitutional people, the highest authority to be sure, but highest *under the Constitution*. This "constitutional people" is self-controlled; in its ordinary feelings, it does not want to govern more or otherwise than by electing officials who will govern it.

It appears, then, that the American people, as sovereign, transformed itself with the leadership of the Founders into a constitutional people. While retaining its sovereign right under the Declaration of Independence to alter or abolish a defective government and set up a new one, it would do any of these things with the same intent of controlling itself. This intent is stated best in *The Federalist*, the most authoritative, yet unofficial, commentary on the Constitution. Its authors assume that any American government will be popular; therefore, the fundamental distinction to be established is between the two forms of popular governments: republic (good) and democracy (bad).

Republican governments old and new

A republic is based on the presumption that *the* problem of popular government comes from within the regime—from factions and tyrannical majorities. So it provides a constitution through which the people chooses to limit itself not by preventing the majority from ruling as in oligarchy, nor by retaining a privileged class to rule with the majority as in "mixed government," but by constructing the majority so that it will not be factious and tyrannical. This

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new kind of republic is contrasted (in *Federalist* Nos. 9, 10, and 14) to the old kind found in the republican tradition, which is given the pejorative label "democracy." In democracy, the presumption is that the danger comes from outside the regime—from monarchy and oligarchy. So the popular spirit must be aroused and kept in a state of vigilance against its enemies; and instead of a constitution providing self-chosen limited government, the main requirement is to cultivate this vigilant spirit in republican virtue. Republican virtue, in turn, requires a homogeneous people and a small territory so that citizens can know and trust each other. The Anti-Federalist opponents of the Constitution promoted this combination in what has been called the "small-republic argument," a considerably modified version of the classical republicanism that has its source in the ancients.

Both kinds of popular government are by choice, it was thought. For whatever may be said in favor of the rule of the wise or of the few most virtuous, monarchy and oligarchy in practice come down to hereditary rule. The alternative, then, appeared to be between government the people choose and government imposed by chance through heredity: To be republican was to opt for choice. Since choice is a certain activity of the soul, republicanism was the choice to establish and protect that activity in the soul. Its claim was not to make a people richer or more secure but to make it free—and free not in the sense of more mobile or more capricious, but in the sense of free to choose.

Yet how free to choose can a people be? This was the issue between *The Federalist* and the Anti-Federalists. A people would not choose to limit itself in a constitution if there were no difficulties in its choosing. Classical or primitive republicanism, with its dependence on a small territory, homogeneous people, and cultivated virtues, exaggerates the extent of human choice. But the new constitutional republicanism takes account of things in nature and by chance that cannot be chosen and joins them to things that can be chosen. A republic might prefer to live by itself, under a homogeneous majority, and with virtues to keep it moderate. But a regard to the necessities of international relations and of human nature will reveal that these desirable things are beyond the power of human choice. Taught by the new political science of *The Federalist*, a republic will not choose what is, abstractly, most choiceworthy, but will be content with, or indeed make the best of, a large territory, a diverse people, and a spirit of interest and ambition. It is characteristic of the American Constitution, by contrast with republican tradition,

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to *constitutionalize* necessities. Those necessities limiting our choice, which we would like to wish away, are brought into the Constitution so that the people, through its government, can choose how to deal with them after having anticipated the necessity of dealing with them. The difference between republic and "democracy"—or in our terms, between constitutional democracy and pure democracy (or classical republicanism)—is made by a constitution that constitutionalizes the necessities limiting political choice. Whereas a pure democracy is small, homogeneous, and (it hopes) virtuous, a constitutional democracy is large, diverse, and ambitious, and represents those necessities in its constitution.

Necessities represented in the Constitution must also be represented in the souls of American citizens. The warmth of their republican genius must somehow be cooled; the confidence in their own sovereignty, which is responsible for the factiousness of democratic majorities, must be restrained. The Constitution is designed to make reason paramount over the passions: It is "the reason, alone, of the public that ought to control and regulate the government. The passions ought to be controlled and regulated by the government" (*Federalist* No. 49). Control of the people by government must be control of the passions by reason, by the *public's* reason since this is not an aristocracy of the wise. The "cool and deliberate sense of the community" must be found (*Federalist* No. 63). This is the job of the Constitution, which has been made with the aid of a new political science. The new political science, based on constitutionalists such as Locke, Hume, and Montesquieu, but more republican than they, will teach republicans to put government at arm's length, out of immediate control, instead of within their grasp, as in classical republicanism. The public's reason will then be enabled to rise above the passion or interest of a temporary majority, and the horrifying alternation between anarchy and tyranny that has characterized heretofore the histories of republics will be avoided.

The scientific concept of "interest"

It has become quite usual, on the right as well as the left, to misunderstand the cooling or sobering effect of the Constitution as an innovation that makes it unnecessary to worry about souls. It is believed that the Framers meant to replace the difficult and disputable notion of soul with a scientific concept of "interest." Woodrow Wilson, the first president to criticize the Constitution, blamed it for being based on an obsolete eighteenth-century version of Newtonian mechanics. Others in our day have praised it for anticipating

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the magic of cybernetics, for being "the machine that would work of itself." One prominent conservative, George Will, has denied that the Constitution is an exercise in "soulcraft." Behind these views is the opinion that the *limits* to choice introduced by the Constitution to cool the republican consciousness extend to the *elimination* of choice, so far as possible.

When choice has been eliminated, human behavior becomes predictable with exactness, not merely as a trend or a tendency. In this condition, it does not matter what citizens have in their souls that may prompt them to act constitutionally, or in such manner as to make the Constitution work properly. Instead of looking into their souls—surely a difficult and dubious enterprise—one may simply consult their self-interest. Any departure from self-interest becomes quickly or visibly evident to an observer, and, except in the case of stupidity or stubbornness, also to the person concerned. The Constitution so understood works automatically. It may have flaws because the interactions of self-interest have been miscalculated, but these can be corrected by knowledgeable, state-of-the-art political scientists. These political scientists may disagree in their diagnoses, but only temporarily, for their studies will accumulate and converge on an ascertainable standard, the self-interest of a rational actor. If one adds the intention of the Framers to this convergence, then the machine has an identifiable manufacturer.

As between those who approve of such a system and those who deplore it, it is hard not to side with the latter. They are correct to say that the Constitution so understood bears a strong resemblance to the disease of the soul from which we began—the dependency discerned variously by Tocqueville and critics today. A system of interests, indeed, is nothing other than the rigorous definition of a nation of dependents. To be independent, one must choose; but it is often expensive to choose and easier—less costly, annoying, or dangerous—to let someone else choose for you. "Interest" is the concept that allows someone else to do this because you do not choose your interest, and it can be imputed to you as a "rational actor." In the literature of rational actors, it is notorious that no justification can be found for the act of voting: Since your absence at the polls will not be noticed, it is rational for you to stay home and be a "free rider." Here is the fundamental act of constitutional sovereignty found foolish, and the come-to-me apathy of the consumer in a service economy and entitlements polity pronounced reasonable. A system of interests wants to know for sure how you will behave. It cannot tolerate the indeterminacy of hoping for the chance that you may

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act according to the virtue in your soul. So it proceeds as if that virtue were unnecessary and, in doing so, *makes* it unnecessary. Citizens have nothing to live up to, nothing to sacrifice for, no sense of honor, no pride. All they have is their interest, rather, their separate interests, to which their freedom is a hindrance and the state of their souls an irrelevance.

Fortunately, it seems clear that the Founders did not foist such a system of interests on us. The description of the Constitution in *The Federalist* does not sustain this interpretation, not even the analyses in *Federalist* Nos. 10 and 51, which are the main reliances of the automatic or mechanical view. In *Federalist* No. 10, one does indeed find an argument for representative as opposed to direct popular government, and for an extensive rather than a small republic; and to control majority faction, it is said, an increased variety of parties and sects will succeed where moral and religious motives alone will not. But citizens are expected to desire liberty as well as promote their interests, to form parties to advance their opinions as well as protect their property, and to elect "fit characters" as well as check the sinister influence of dominant majorities.

Not only are the people expected to be virtuous but also those who run for office. The famous phrase in *Federalist* No. 51—"Ambition must be made to counteract ambition"—is often cited as proof of the self-interested character of the Constitution. But the "rational actor," we have seen, is more likely to be a free rider than an ambitious man. He will let someone else do the work, take the risk, and suffer the indignity of running for office. And, in fact, if the system of ambition counteracting itself works, no personal gains in office can be hoped for. The ambition allowed, even encouraged, in the working of the Constitution is surely a departure from the suspicion of one-man rule characteristic of republics previous to this one. It is a sober accommodation to the desire for self-promotion in human nature. But it does not forget the pride in achievement also to be found in human nature. Adam Smith distinguished between the "sober undertaking" characteristic of the self-interested and the "spirited undertaking" in which a glory-seeker will waste his substance. But the Framers of the Constitution, with better understanding of politics, hence of human nature, recognized that it was sobriety to take care of the spirited desire to choose, in the people, and to succeed, in the ambitious. Instead of establishing a government that requires and cultivates republican virtue, the Constitution calls it forth. The virtue called forth in our constitutional republic is less martial and less egalitarian than in the direct democ-

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racies and mixed republics that *Federalist* No. 10 blames for "instability, injustice and confusion." But since sobriety and love of honor are not automatically produced, they remain virtues. If they are consistent with each other and with human nature, and so altogether more reliable as republican virtue than the classical version, this does not make them dispensable or detract from them as virtues.

Virtue and interest

Still, one might object: How can a constitution that says nothing of education be concerned with souls? The answer is, indirectly. The Constitution, by implication, leaves education to the states. But it does so to encourage local communities in the states to provide education, not out of unconcern. The new federalism (as it was then) of the Constitution allows the people to use government without being awed by its size, and so to organize a common life without becoming prisoners of organization. And in the federal government, separation of powers has a similar effect and intent. At first it seems, as we have seen in *Federalist* No. 51, that the only reason for keeping powers separate is to enable them to check each other. But soon it becomes clear, as *The Federalist* goes on to explain and defend the three branches, that much more can be expected of officeholders than a stubborn insistence on having one's own way: virtue in congressmen (*Federalist* No. 55), character and moderation in senators (*Federalist* Nos. 62 and 63), energy in the president (*Federalist* No. 70), knowledge and judgment in the judiciary (*Federalist* No. 78). The extent to which these qualities can be expected varies with the office and finally remains uncertain. Altogether, one can speak only of an "aptitude and tendency" to produce them, which *The Federalist* argues comes not from the character of a certain class expected to hold the Constitution's offices (a propertied oligarchy or elite) but from the formal characteristics (term, mode of appointment, powers) of the offices. The Constitution cannot guarantee success in the discovery and election of persons with the requisite qualities to take advantage of the opportunities of these offices for the exercise of virtue. To provide such a guarantee, even if it were somehow possible, would detract from the voluntariness of choosing to seek office and of electing: Virtue cannot be guaranteed without losing its character as virtue. But the Constitution can improve the chances for virtue; it can set up a tendency to responsible government (*Federalist* No. 63) in a new sense of "responsible" now familiar to us as "choosing to be responsible for," rather than merely "responsive to," the people. Responsible government is responsive to the people,

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but it also takes responsibility out of the hands of the people on their behalf.

In *The Federalist*'s interpretation of the Constitution, the voluntary rather than the habitual or cultivated side of virtue is stressed. To do this, a certain understatement is more effective and appropriate than exhortation. Virtue may go under the modest name of "interest," as when the long term of a president is said to put it in his "interest" to avoid "servile pliancy" to a prevailing current either in the people or in the legislature (*Federalist* No. 71). This is the "interest" of the kind of person who cannot live by his interest in the more usual, confined sense of the word, but insists instead on taking the risks necessary to be known as an energetic president. (And "energy" is another term, introduced by *The Federalist* and now ever so American, by which we mean virtue and say less.) In the same spirit of constitutionalized democracy, Americans today use a distinction between short-term and long-term interest to hide their virtue. "Short-term" interest is really your interest, and "long-term" interest is really your duty; but the choice between them sounds more voluntary, less demanded, if both options are kinds of "interest." A respectable journal would hesitate to use the name *Public Virtue*, but this does not mean that every consideration of interest belongs in the *Journal of Sordid Calculation*.

It is of course important that under the influence of our political science, the word "virtue" has largely been replaced by "interest"; but this does not imply that the qualities once designated as virtues or helpers of virtue are such no longer. They remain virtues, and (in a sense I have been arguing) all the more so for lacking the praise and splendor usually accorded the virtues. The vital question, however, is whether we continue to think, with the Founders, that virtue must be *self*-generated, or now believe that virtue will be *automatically* generated. The latter is destructive of virtue as voluntary, hence destructive of the independence of citizens. It seems that by the realism of not exhorting to virtue, we are attempting to add voluntariness to it because virtue not required is freer and even nobler. But virtue not required is also the essence of the "permissiveness" we deplore today, for the worst thing about permissiveness is not that everything is permitted, but that given this condition, *nothing interesting happens.*

The realm of the soul

How did it come about that virtue is not required but somehow expected under our Constitution? To explain our embarrassment

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with the notion of "virtue," we must see why modern democracy is unhappy with the word "soul." For virtue was once thought to be the virtue of a soul directed or inclined to an end that is beyond the satisfaction of mere bodily appetites. What is this higher end? The classical political philosophers such as Plato and Aristotle tried to define it, but in practice, in politics, the higher end was defined by religion, and by each religion in an exclusive and contentious recipe for saving one's soul. The constitutionalist philosophers, above all John Locke, decided that this issue—the religious issue—could be solved if the human desire for seeking higher ends could be contained. This Locke attempted to do by establishing a distinction that is the basis of modern constitutionalism.

Modern constitutional government is limited government, as we have seen; and the limitation on government is expressed in the distinction between "state" and "society." The state, which is public, is in the service of society, which is private; and the state is limited to this service as a means is limited by its end. This is not the whole truth because we do speak of "the public" as having authority over merely private inclinations, and because constitutional formalities such as due process of law cannot be understood merely as means to an end. But the subordination of state to society is the main truth of constitutional government, which is shared by liberals, conservatives, and even radicals despite the various pet projects of intervention in others' liberties cherished by all three parties. That these projects are known as "intervention" sufficiently indicates the general expectation that government be limited.

The distinction between state and society, the basis of constitutionalism, has a basis itself, which was stated clearly by Locke in his *A Letter Concerning Toleration*: It is the further distinction between body and soul. The magistrate, Locke says, has jurisdiction only over "civil interests" such as "life, liberty, health and indolency of body," together with property, and his power "neither can nor ought in any manner to be extended to the salvation of souls." Society is the realm of the soul, or today what passes for the soul, the self.

Difficulties arise for the constitutional distinction between state and society, and for limited government, when (or because) the soul is not content with ruling itself but tries to rule other souls. When this happens, a part of society seeks to use the power of the state to rule the whole of society. It was to prevent such abuse in the form of religious intolerance that the constitutional distinction was established. When the soul seeks a higher principle than self-preservation, it is sure to find one that justifies rule of others besides yourself. Self-preservation as an end may be universal, but it is also quite per-

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sonal to your own body and does not justify interference with others (this was its advantage to Locke). But salvation and virtue prompt devotion and sacrifice: And if these ends hurt me, why not you too? A higher principle that asks much of oneself may reasonably, must rationally, make demands on others. If others cannot or will not comply, they deserve compulsion or contempt, not tolerance.

Therefore, to contain the soul, one must diminish it. To keep one person's soul from claiming jurisdiction over others' souls so as to tell others what to do and how to live, it is necessary to reduce his capacity for ruling himself. To keep one person (or an aristocratic few) from choosing for others and becoming responsible for them, it is necessary to limit the scope of his choice and responsibility for himself. That is why, in the psychology of Locke and the thinkers who followed him, the notion of necessity begins to replace choice, and interest begins to replace virtue. If you *have* to act as you do because it is your necessity or your interest, you cannot blame others, and claim to *rule* them, because they do the same. Paradoxically, liberty can be advanced and secured to a degree never before seen in the world if only individuals can be convinced that each is less free to choose than it had previously been acceptable to believe.

Ruling oneself . . . and others

Constitutionalism then faces a dilemma that helps to explain the condition of democratic souls today. On the one hand, limited, constitutional government requires that the people and society be independent and distrustful of the state. For how can the state serve society if society craves the state? If government is to remain limited, individuals must be able to stand on their own feet and rule themselves, to a considerable extent at least. They must be able to feel that they control government rather than the reverse. But on the other hand, if the people feel themselves independent and capable of ruling themselves, what prevents them from extending their sense of responsibility, not merely to the behavior, but to the souls of others? For example, in the debate over abortion in America today, one sees the pro-choice party as eager to rule fellow citizens as is the apparently more prescriptive pro-life party. The pro-choice party wants the choice of abortion to be common and respectable, while the pro-life party wants it to be abhorred. Thus the pro-choice party chooses for others just as much, though in a contrary direction, as the pro-life party. From this one can infer that the desire to rule others derives from the desire to rule oneself, so that there is something dangerous to liberty in the responsible individual: It is

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better, as we have seen, that he should stick to his interest and forget about his soul. But then, as we have also seen, your interest can make you the servant of whoever serves your interest, leaving you dependent and apathetic and suffering under the false consciousness that being a free rider is the same as being free. Constitutionalism demands a people that is independent, but not so much as to think itself capable of governing without a constitution; it needs a sense of responsibility that is aware of the limits to responsibility.

Modern constitutionalism began with a defense of the independence of the human soul against the claims of divine right. But the very measures taken to protect the soul have reduced its independence to the point where we are embarrassed to use the word. For us, to speak of "soul" smacks of religion, yet we cannot help feeling that the "self" is something much less noble than the soul, and when used (as it often is) in the sense of automatic, much less free. We should not be surprised, then, even from the standpoint of constitutionalism, let alone that of religion, that the demon of divine right still needs to be exorcised, and that the "lost soul" of Puritan America reappears in a revival of fundamentalist religion. For the fundamentalists are no more wrong than was Nietzsche to protest the flatness of our democratic souls.

For the most part, however, religion under our constitutionalism takes the form of religiosity, which is religion of the self rather than the soul, more concerned with being religious than with God. This religiosity can be associated with either one of two rival conceptions in our day that attempt to inspire independence in the souls of citizens: on the right, the work ethic; on the left, the doctrine of the creative self. Though the work ethic is much to be preferred, both conceptions are defective in what they attempt. The doctrine of creativity does not distinguish valuing from worth, does not identify the truly creative, and ends in flattering democratic vanity. The work ethic is superior because it asks for effort from citizens and requires them to stand up to be judged instead of merely confirming them in their dependence. But the work ethic does not clarify the relationship between the individual responsibility that brings success and the collective responsibility of self-government. Its proponents want to minimize or privatize the public, and they forget that although the public can be put on a regimen and a diet, it cannot be done away with. For the public comes from our desire to rule, a desire that can be ennobled or perverted but cannot be evaded or extinguished. The spirit of liberty that forms democratic souls must find ways of choosing together as well as protect our choosing apart. Combining them so as to do justice to both is the work of our Constitution.

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The new pursuit of happiness

WALTER BERNS

LANDING IN NEW YORK in May 1831, Gustave de Beaumont was struck by the "busyness" of the place. "It's a remarkable phenomenon," he wrote his father, "a great people which has no army, a country full of activity and vigour where the action of the government is hardly perceived." His companion, Alexis de Tocqueville, said much the same thing in a letter to *his* father:

> Everybody works [he wrote], and the mine is still so rich that all those who work rapidly succeed in acquiring that which renders existence happy. The most active spirits, like the most tranquil, find enough to fill their life here without busying themselves troubling the state. The restlessness which so wracks our European societies seems to co-operate toward the prosperity of this one. It aims only at wealth, and finds a thousand roads which lead there.

An inactive state and an active, prosperous people; or more precisely, an inactive state and *therefore* an active, prosperous, and free people. What Beaumont and Tocqueville saw in America was not the result of chance.

John Jay attributed it to the fact that the country and the people "seem to have been made for each other," and he was willing to concede that Providence may have had a hand in this. Providence, he

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said in *Federalist* No. 2, had blessed the country with a variety of fertile soils and productions and watered it with innumerable streams for the delight and accommodation of its inhabitants; and with rivers that serve as "highways for the easy communication of friendly aids and the mutual transportation and exchange of their various commodities"; and, perhaps most important, with a "succession of navigable waters [that form] a kind of chain round its borders, as if to bind it together."

This one connected country, Jay continued, was given to one united people, a people descended from the same ancestors, speaking the same language, professing the same religion, very similar in their manners and customs, and who, "by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence." These words were, of course, written to persuade New York to ratify the proposed Constitution, and in them Jay could be said to have exaggerated the degree of unity, but not more than the occasion excused, and not all that much. As Tocqueville was to observe some forty years later, Maine and Georgia were a thousand miles apart, but their peoples had more in common than those of Normandy and Brittany, "separated only by a brook." And Jay was not exaggerating when he said, in that same passage, that Americans were "attached to the same principles of government." That was the decisive element in their unity, and that would prove to be the decisive factor in what the nation was to become or, indeed, what it was already becoming.

Had Beaumont and Tocqueville arrived a century and more earlier, they would have found the same country—the same fertile soils, the same streams, the same waterways, and the same natural chain round its borders—but a different people, and because a different people, little communication (and none of it "easy") and very little exchanging of commodities. In fact, they would have found a people less interested in commodities and more in salvation, but not in complete agreement as to how it was to be obtained. Early America was nothing if not religious and, on that subject, disputatious.

Here, for a sample, is an account of the "Antinomian Crisis" of 1636 written by John Winthrop, the governor of the Massachusetts Bay colony: "One Mrs. Hutchinson, a member of the church of Boston, a woman of a ready wit and bold spirit, brought over with her two dangerous errors: 1. That the person of the Holy Ghost dwells in a justified person. 2. That no sanctification can help to evidence to us our justification.—From these two grew many branches; as,

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1. Our union with the Holy Ghost, so as a Christian remains dead to every spiritual action, and hath no gifts nor graces, other than such as are in hypocrites, nor any other sanctification but the Holy Ghost himself." And so on. A hundred and fifty years later, another governor (or former governor), Thomas Jefferson, said that, so far as he was concerned, his neighbor might worship this god or that god, or one god or twenty gods. It neither picked his pocket, he said, nor broke his leg. Only an uncharacteristic circumspection prevented Jefferson from adding that his neighbor was free to worship no god at all.

Something of importance had obviously occurred in the interim to affect the way men thought about such matters, and what it was can be glimpsed in the writings of John Wise, who preached in and around Boston in the years between Winthrop and Jefferson. Something had happened to cause Americans (including at least this one Puritan preacher), without knowing it or, at any rate, without acknowledging it, to begin to speak the language of Thomas Hobbes, whose "justly decried name" even John Locke had hestitated to mention—in public, that is. Hobbes had likened the sovereign power to an "Artificiall *Soul*, as giving life and motion to the whole body," and Wise (writing in his *Vindication of the Government of New-England Churches*, 1717) likened it to "the Soul infused, giving Life and Motion to the whole Body"; Hobbes, "the *Magistrates* [are the] artificiall *Joynts*," and Wise, "the Subordinate Officers are the Joynts by which the body moves"; Hobbes, "the *Wealth* and *Riches* of all the particular members, are the *Strength*," and Wise, the "Wealth and Riches are the Strength"; and so on down Hobbes's metaphorical list. When the formulations and thought of the boldest of atheists succeed in insinuating themselves into the mind of a New England divine, something has indeed happened to change the way men think about the things that matter to them.

The religion problem

Shortly after the close of the Constitutional Convention, James Madison wrote to Jefferson warning him of the necessity to deal with the religion problem—even in its coolest state, he said, religion has been "much oftener a motive to oppression than a restraint from it"—but, of course, Jefferson needed no instruction on this subject. Among the public documents addressed to this problem, none was of greater consequence than the Virginia Statute for Religious Freedom. Historian Bernard Bailyn goes so far as to say it is the "most important document in American history, bar none." Drafted origi-

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nally by Jefferson in 1777, debated but not adopted in 1779, and, thanks in large measure to Madison's persistence, finally adopted in January 1786, the statute owes its ideas and even its principal formulations to John Locke's famous *Letter Concerning Toleration*. Jefferson had not only read Locke's *Letter*, but had taken careful notes on it—notes which have been preserved—and, as one modern scholar (S. Gerald Sandler) has demonstrated, these notes, bearing Locke's teaching, found their way into the statute. No one's name is more closely associated with the cause of religious toleration than that of John Locke, and rightly so; but it was not Locke who initiated the process that can be said to have culminated in the United States. That honor belongs to Thomas Hobbes. Hobbes discovered the rights of man and, with that discovery, revolutionized politics.

Nature, Hobbes said, commanded men to seek peace, but under the laws of England and at the behest of the clergy and other quarrelsome persons, they were more inclined to wage war. Neither tolerant nor forgiving, the clergy preached disobedience and caused sedition. "How many throats hath this false position cut, that a prince for some causes may by some certain men be deposed?" And again: "What bloodshed hath not this erroneous doctrine caused, that kings are not superior to, but administrators for the multitude?" And lastly: "How many rebellions hath this opinion been the cause of, which teacheth that the knowledge whether the commands of kings be just or unjust belongs to private men, and that before they yield obedience, they not only may, but ought to dispute them?"

The beginning of a solution was to be had by persuading men that outside the law there were no "authentical doctrines of right and wrong, good and evil," and, as a consequence, that no one had a right to govern another person unless that person gave his consent. Whereas men were taught by the clergy to do unto others as they would have others do unto them, neither they nor the clergy were able to agree on what it was they would have done and, therefore, what it was they should do. Hobbes turned that rule around, and by doing so provided the foundation on which others would build the liberal state: "*Do not that to another, which thou wouldest not have done to thyself.*" In short, mind your own business, or leave your neighbor alone. Hobbes thought there was a good possibility of getting men to agree to that and, with the Leviathan to keep them in line, getting them to keep that agreement.

Locke was the immediate source of much of the Declaration of Independence, but it was Hobbes who first began to speak of the

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rights of man and, by so doing, changed the terms of American political discourse. By the time of the Founding, seemingly everyone—the rich and the poor, the schooled and the unschooled, in fact, everyone except the so-called Tories—was speaking the language of the rights of man. Here are a few examples from the more remote parts of the country: "the people at large are endowed with alienable and unalienable Rights"; "ALL MEN ARE BORN FREE AND EQUAL"; "every man hath a natural and unalienable right to his own opinion, and, for asserting this right, ought not to be stigmatized with the epithets of tenacious and dogmatical"; "*all men are born equally free, and in point of human rights to liberty, stand on equal ground.*" As Jefferson said many years later, the sentiments expressed in the Declaration of Independence "were of all America," "an expression of the American mind," and "the common sense of the subject."

Taking religion out of politics

The world had changed, and radically, since the days of John Winthrop and the Massachusetts Bay Colony; and the terms of politics had changed in the years since 1620 when William Bradford, Miles Standish, John Alden, Gilbert Winslow, and the other Mayflower passengers did "solemnly and mutually in the presence of God, and of one another, convenant and combine [themselves] together in a civil body politic, for [their] better ordering and preservation [and] for the glory of God, and advancement of the Christian faith." In 1776, their descendants also entered into a solemn compact, but not for the purpose of advancing the Christian faith. On the contrary, guided now by the "light of science," as Jefferson put it in a letter written fifty years later, they contracted one with another in order to secure their private rights; in the words of a later Winthrop (James, an Anti-Federalist writing under the name of Agrippa), "no man when he enters into society, does it from a view to promote the good of others, but he does it for his own good." And, in declaring their right to self-government, they invoked not the God of the Old and New Testaments (who, of course, says nothing about that right), but "nature's God." In that letter, the last he is known to have written, Jefferson said this about the Declaration of Independence:

> May it be to the world, what I believe it will be (to some parts sooner, to others later, but finally to all), the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-

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> government. That form which we have substituted, restores the free right to the unbounded exercise of reason and freedom of opinion. All eyes are opened, or opening, to the rights of man.

Life, liberty, and the pursuit of happiness; the difference between the new politics and the old is embodied in these rights, and most evidently in the last of them. The right to pursue happiness is the right to pursue a happiness that everybody defines for himself, and the government that secures it will be one that, to the extent possible, leaves men alone to do what they want to do. This was altogether new, a project that originated with Hobbes, and in it lay the genius, or the ingeniousness, of the new dispensation; it made agreement easy, or relatively easy. By removing a major cause of civil strife, it facilitated the achievement of peace. No longer would a Governor Winthrop be entitled to make a public issue of an Anne Hutchinson's apostasy, or, in his capacity as governor, even to call it apostasy. The effect was, and was intended to be, to take religion out of politics.

This was (and is) the purpose of that provision in Article VI of the Constitution forbidding religious tests: "[N]o religious Test," it reads, "shall ever be required as a Qualification to any Office or public Trust under the United States." The novelty and, indeed, the radical character of this provision can be made evident by comparing it with the Toleration Act of 1689, the act praised by Thomas Babington Macaulay as "very near to the idea of a great English law." However happy its consequences, the Toleration Act could not have passed constitutional muster in the United States. It brought a degree of peace to Britain by permitting dissenters (or, at least, Protestant dissenters) to worship according to their own conscience, but it did not divest the Church of England of any of its offices or signs of its rank and authority, and it did not cast doubt on the validity of the established Articles of Religion. In principle, persecution was still the rule and liberty of conscience the exception, an indulgence granted by a generous government. There could be no such rule, and therefore no such exceptions, in America. As Jefferson said in his draft of the Virginia Statute for Religious Freedom, "our civil rights have no dependence on our religious opinions, more than our opinions in physics or geometry." Some New Englanders complained that by prohibiting religious tests the Constitution "opened a door for Jews, Turks, and infidels," but, Madison noted, they were wrong to do so. The plain fact was and is that anyone might become an American, or, at least, that no one was or is ineligible on account of his religion.

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The newly elected president, George Washington, made this clear in his response to the Hebrew Congregation of Newport, Rhode Island (and this even before the First Amendment had been added to the Constitution): "[I]t is now no more that tolerance is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights." And he was equally emphatic in his conclusion: "May the children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other inhabitants, while everyone shall sit in safety under his own vine and fig-tree, and there shall be none to make him afraid." Thus, no one should have been surprised when a Jewish congressman (Sol Bloom of New York) was appointed by Congress in 1932 (a few months before Hitler came to power in Germany) to direct the bicentennial of George Washington's birth and, in 1937, the sesquicentennial of the Constitution. This is the way it was supposed to be and, especially when compared with other places (Iran, Lebanon, Israel, Ulster, to name only the most obvious), to say nothing of other times, this is the way it is. The Framers had memories of those other times, and they could have anticipated the other places, which is why they designed a constitution to take religion out of politics. The basis of their design was provided by the philosophers of natural right.

Science and industry

In *The Wealth of Nations*, Adam Smith had suggested that, under some conditions at least, religious peace would be easier to achieve in a large country; and size, or an "ENLARGEMENT of the ORBIT," was a principal feature of the Framers' plan for the United States. With size, said James Madison in *Federalist* No. 51, will come not only a multiplicity of economic interests, thereby providing security for civil rights, but a multiplicity of sects, and with a multiplicity of sects will come security for religious rights and, therefore, religious peace. At least, size will have this consequence in what he elsewhere referred to as a civilized or an enlightened society.

Smith was even more explicit about this condition. If politics had never called in the aid of religion, he said, had the conquering party never adopted the tenets of one sect more than those of another, had it allowed each man "to chuse his own priest and his own religion as he thought proper," there would have been a multiplicity of sects and, as a consequence, less fanaticism, less zeal, and less strife. The zeal of religious teachers can be dangerous, Smith said, only where there is one established church, or where the

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society is divided into two or three great sects. "But that zeal must be altogether innocent where society is divided into two or three hundred, or perhaps [and here Smith allows himself to get carried away] into as many thousand small sects, of which no one could be considerable enough to disturb the public tranquillity." Finding themselves surrounded on all sides by adversaries or competitors rather than friends, the "teachers of each sect" would come to see the virtues of moderation or perhaps even ecumenicalism. The result would be a "pure and rational religion, free from every mixture of absurdity, imposture, or fanaticism, such as wise men in all ages of the world have wished to see established."

Unfortunately, because of "popular superstition and enthusiasm," this plan of ecclesiastical government, "or more properly of no ecclesiastical government," has never been established anywhere. What was required was enlightenment, and, with this in mind, Smith proposed the study of science as well as the encouragement of "public diversions" or entertainment, and the "gradual improvements of arts, manufactures, and commerce." To the same end, the Framers not only prohibited religious tests and laws respecting an establishment of religion, but gave Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." America was to be separated from religion, but, as part of the same project, joined to science and industry and the things they promised; it was to be a commercial society. "The prosperity of commerce," wrote Alexander Hamilton in *Federalist* No. 12, "is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares." The reason for this is explained in the sequel:

> By multiplying the means of gratification, by promoting the introduction and circulation of the precious metals, those darling objects of human avarice and enterprise, it serves to vivify and invigorate all the channels of industry and to make them flow with greater activity and copiousness. The assiduous merchant, the laborious husbandman, the active mechanic, and the industrious manufacturer—all orders of men look forward with eager expectation and growing alacrity to this pleasing reward of their toils.

The immediate source of this commercial plan was, quite obviously, Adam Smith. It was Smith who demonstrated that the wealth of a nation was to be found in the productivity of its citizens, Smith who spoke of multiplying "the means of gratification," and Smith who argued that a commercial society possessed the means by which

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"the whole temporal power of the clergy" might be destroyed.[1] But ultimately this was John Locke's project; it was he who first recognized the property right and what might be accomplished by securing or protecting it.

Pursuing the "good things of this world"

From Locke, "America's philosopher," as he used to be called, the Framers learned how to channel the passions and energies of men into safe activities. As I pointed out above, the government that secures the right to pursue happiness will be one that, to the extent possible, leaves men alone to do what they are inclined to do. And according to Locke, they are *naturally* and primarily inclined to seek the "conveniences and comforts of Life." This inclination, Locke said, derives from "the strongest desire God Planted in Men, and wrought into the very Principles of their Nature," that of "Self-Preservation." It follows that government is obliged to protect the right to acquire property, the "conveniences and comforts of life."

When the right is protected—which will have the effect of encouraging men to do what they are naturally inclined to do—they will devote themselves to the task of acquiring the "good things of this world," as Tocqueville put it, rather than "concentrate all their faculties on the contemplation of the next." Madison went so far as to say that the "first object of government" is to protect these faculties when they are so employed. "From the protection of different and unequal faculties of acquiring property," he wrote in *Federalist* No. 10, "the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties." In "civilized nations," in addition to creditors and debtors, there will be a landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, and many "lesser interests," and none of them inclined to cooperate for their common good; on the contrary, they will be "more dis-

[1] "In the produce of arts, manufactures, and commerce, the [European] clergy . . . found something for which they could exchange their rude produce, and thereby discovered the means of spending their whole revenues upon their own persons, without giving any considerable share of them to other people. Their charity became gradually less extensive, their hospitality less liberal or less profuse. Their retainers became consequently less numerous, and by degrees dwindled away altogether. The clergy . . . wished to get a better rent from their landed estates, in order to spend it . . . upon the gratification of their own private vanity and folly. But this increase of rent could be got only by granting leases to their tenants, who thereby became in a great measure independent of them. The ties of interest, which bound the inferior ranks of people to the clergy, were in this manner gradually broken and dissolved." (*Wealth of Nations*, Adam Smith [New York: Modern Library, 1937], p. 755.)

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posed to vex and oppress each other." The situation will demand the attention of government. In fact, "the regulation of these various and interfering [economic] interests forms the principal task of modern legislation." Of course, the society will also be divided into various sects, but, presumably because they will not be "disposed to vex and oppress each other," these various sects will not compete with each other in any way that requires the government's attention; they will not form separate and competing parties because they will not have separate and "interfering" interests. When men are primarily concerned with the goods of this world, their religious passions will be moderated.

That this would happen, and, indeed, had already begun to happen, was evident to Tocqueville as early as the 1830s. The policy of separating church and state, as we have come to call it, was intended to have an effect not only on the laws but on the character of worship and, because of that, on the character of opinion. Without the support of the laws, it was expected that, for most people at least, religion would become merely a part of life rather than an entire way of life, a part consigned or relegated to one day (or perhaps merely one morning) a week. One consequence of this would be—and, in the event, soon was—a more tolerant public. As Tocqueville observed, public opinion may have obliged everyone to show himself at church on Sundays, but it obliged him to very little else. "Go into the churches (I mean the Protestant ones) you will hear morality preached, of dogma not a word," he wrote to his friend Louis de Kergolay. "Nothing which can at all shock the neighbor; nothing which can arouse the idea of dissent." And, he might have added, nothing that threatens the peace among the various sects. With respect to religion, live and let live is the American way.

The various economic interests will, of course, compete with each other, but that competition can be turned to their mutual advantage. As Hamilton said in *Federalist* No. 12, by multiplying the means of gratification, by promoting the introduction and circulation of the precious metals, "those darling objects of human avarice and enterprise"—which is to say, by encouraging men to do what they are naturally and primarily inclined to do—the channels of industry will flow with "greater copiousness." All orders of men, he promised, at least, all orders of *working* men, could look forward to sharing in the greater and constantly growing wealth of this nation.

Economic interests North and South

In this large commercial republic, the animosity of the old-fashioned religious factions would be (and was) replaced by the

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peaceful competition of economic interests; peaceful because, all of them prospering to a greater or lesser extent, the various interests would recognize that they have a common interest in preserving the constitutionally guaranteed liberty that makes this possible. Karl Marx to the contrary notwithstanding, America would not be characterized by class struggle; in fact, and much to the despair of generations of socialists (not all of them Marxists), America would not have the materials for a class struggle: It would not have classes. There would be rich persons, sure, but the American rich, unlike the rich of the past, would have no interest in keeping the poor down. There would be poor persons, but the American poor, unlike the poor of the past, would have no interest in bringing down the rich, certainly not if it required them to destroy the liberty that allowed the rich to become rich and by which they hoped to become rich themselves.

The exception to this, and it serves to prove the rule, would be in the feudal South, a fact observed by Tocqueville when he and Beaumont first crossed the river from Ohio to Kentucky. Writing again to his father, he remarked on the difference between the free and the slave economies:

> For the first time we have had a chance to examine the effect that slavery produces on society. On the right bank of the Ohio everything is activity, industry, labor is honored; there are no slaves. Pass to the left bank and the scene changes so suddenly that you think yourself on the other side of the world; the enterprising spirit is gone. There, work is not only painful; it is shameful, and you degrade yourself in submitting yourself to it. To ride, to hunt, to smoke like a Turk in the sunshine: there is the destiny of the White.

Tocqueville was mistaken about the amount of work being done in Kentucky—by no means was every white riding, hunting, and smoking like a Turk in the sunshine—but his larger point stands. In sharp contrast with the situation in Ohio and the other free states, the life of the Southern white did depend on his being able to keep the poor down, and his destiny was to be brought down by those poor.

Madison apparently did not expect so sharp a distinction between the economies of the various regions. He acknowledged that some of the states were then little more than societies of "husbandmen," having made little progress "in those branches of industry which give a variety and complexity to the affairs of a nation." But he expected this to change with time. "The changes of time," he said in *Federalist* No. 56, would have an assimilating effect "on the comparative situation of the different States," but the opposite effect on the internal affairs of the states "taken singly." In short, the states would come to resemble each other in their complexity or diversity.

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But this did not happen in the South. Slavery and its vestiges prevented the industrialization or "commercialization" of the Southern economy, with the result that not until our own time did Georgia begin to resemble Massachusetts and Atlanta, Boston. To a far greater extent than the other regions of the country, the South remained rural—in its economy, its life, and its tastes—and, in doing so, retained some of the elements of a world not so obviously driven by a Hobbesian fear of violent death and not so keen about its complement, the right of self-preservation; in short, a less comfortable and less prosaic world. From it, therefore, could come pain, cruelty, and violence, but also our poetry and our music—spirituals, jazz, country, bluegrass. And from it, and especially from its Appalachian and other more rural parts, comes today's religious revival and—who knows?—tomorrow's politics. That this should happen just when the South had, so to speak, rejoined the union, culturally as well as legally, may say something about the kind of happiness being pursued in that union.

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The Constitution's human vision

THOMAS L. PANGLE

WHAT WERE the ultimate moral aims of the Founders? Which way of life, which sorts of men and women, was the new regime meant to foster? And equally if not more important: What ways of life and sorts of character was it meant to discourage? What was to be the nature, and the relative status or rank, of religion, economics, politics, the family in the society the Founders envisaged? What were the justifications, explicitly advanced or implicitly accepted, for these most grave and fundamental moral choices?

In asking these questions, we are not merely asking about the Founders; we are at the same time asking about ourselves. For each of us is born into and molded by a specific, and distinctive, American political culture. We cannot reasonably hope to escape this matrix any more than we can hope to escape our parents and the teachers of our youth. We can try, however, to *understand* the historical roots of the civic culture that encompasses us; and in making this effort—an effort, be it observed, involving the heart as well as the mind—we may liberate ourselves as much as is humanly possible. We may arrive at a position from which we can make an independent decision upon the merits of, and thus upon the degree of our allegiance to, the basic moral and political presuppositions that

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shape our spirits. It is only on such a basis that we can germinate within ourselves a rational, adult, and truly chosen attachment to the American political tradition.

It is true, of course, that this tradition has undergone a considerable evolution or transformation in the two centuries since the Founding. There are important respects in which our self-understanding as a people has moved away from the self-understanding of the Founding generation. Yet we have not moved so far from the plans and expectations of the most far-sighted Founders as is often supposed; and even if or insofar as we have evolved away from (or reacted against) the Founders, this evolution and reaction remain derivative. It is the Founders who laid down our most basic rules, who established the primary terms of our moral and civic discourse, and who marked out the lasting outlines and boundaries of our public agenda.

One may fairly raise the skeptical question whether the basic stratum of our civic traditions has the sort of unity that I seem to be assuming. Were there not as many "moral visions" as there were Founders, or factions and parties of Founders? No doubt the Founding generation was riven by sharp and lasting disagreements. But it is just these disagreements—between Federalists and Anti-Federalists, between Hamiltonians and Jeffersonians, between Northern merchants and Southern agrarians—that reveal most lucidly the moral agreement at the deepest level. The quarrels among the Founders, one may say, are family quarrels. On the whole, the antagonists charge one another not with espousing fundamentally different sets of goals but with forgetting, or misunderstanding, or even corruptly betraying, the only goals that anyone can suppose to be legitimate or viable in postrevolutionary America.

What then was the nature of this moral consensus? In order to see clearly what united the American Founders over and against previous republican and nonrepublican political conceptions, we need not turn to the comparative study of ancient history or of foreign lands; we need only recollect America's own early colonial heritage.

That heritage, very much the legacy of the "Old" World, was in large measure a heritage of obedience, not to say servitude: obedience of the individual, conceived as a part, to higher social and divine wholes; obedience of the great mass of men to secular lords and annointed priests; obedience of the laboring agricultural, and commercial or entrepreneurial, classes to the military and leisured classes. Our recognition of this fact is somewhat hampered by the

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Founders' own mode of self-expression. They were quite understandably reluctant to proclaim, or indeed to admit to themselves, the degree to which they had broken with their forefathers. As a consequence, they tended often to trace their assertions of right to purported ancient rights of Englishmen, or to the Bible, or even to classical republican virtue. Yet as their great "project" matured, they voiced ever more frequently and fervently their sense of radical and proud innovation. They evinced an awareness that theology and political philosophy had progressed immeasurably in the preceding century, endowing them, as ordinary humans, as ordinary *individuals*, with a precious and unprecedented legacy of dignity. In the words of *Federalist* No. 14, it is "the glory of the people of the United States that, whilst they have paid a decent regard to the opinions of former times and other nations, . . . they pursued a new and more noble course. They accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe." That this proud self-characterization is largely accurate becomes evident as soon as one begins to juxtapose the Framers' moral discourse with the discourse found in the major documents of early colonial America.

The Old World tradition

Those documents speak a truly premodern, and hence alien, moral language. The Mayflower Compact, for example, contrary to what is so often said today, does not really suggest a social contract of independent and equal men constituting by consent their own sovereign and representative government for the purpose of the protection of their own liberties and property. On the contrary: The compact is one formed among men who characterize their status as that of "loyall subjects" of "our dread soveraigne Lord, King James." Their guiding purpose, they declare, is twofold: "the glorie of God," i.e., the "advancemente of the Christian faith," and the "honour of our king & countrie." Altar, throne, country, and honor: These are the watchwords of those early, extraordinarily deferential Americans—who yet represented some of the most independent-minded souls of their day. Time and again the documents reveal that the overriding, sometimes the sole stated, purposes of civic and social life were these: the glory of monarchic and noble lords—unelected, unrepresentative, unresponsible to any "people"; and the advancement of sectarian and intolerant branches of a Christianity understood in terms that would today be regarded as little short of fanati-

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cally fundamentalist. The ordinance for Virginia of 1621 commands the rulers of the colony to

> bend their Care and Endeavours . . . first and principally, in the Advancement of the Honour and Service of God, and the Enlargement of his Kingdom amongst the Heathen People; and next, in erecting of the said Colony in due Obedience to his Majesty, and all lawful Authority from his Majesty's Directions' and lastly, in maintaining the said people in Justice and *Christian* Conversation amongst themselves, and in the Strength and Ability to withstand their Enemies.

When the Fundamental Articles of New Haven were instituted (June 1639), the first question to which all were asked to assent was: "Whether the Scriptures doe hold forth a perfect rule for the direction of government of all men in all duties which they are to perform to God and men as well in the government of famylyes and commonwealths as in matters of the church." Subsequently, all were asked to assent to the rule that "church members only shall be free burgesses, and that they onely shall chuse magistrates and officers among themselves to have the power of transacting all the publique civill affayres . . . devideing of inheritances, decideing of differences . . . and doeing all things or business of like nature." The New England Confederation of 1643 begins with the declaration that "We all came into these parts of *America* with one and the same end and ayme, namely, to advance the Kingdome of our Lord Jesus Christ, and to enjoy the liberties of the Gospel, in purity with peace." Even where, as in the Patent of Providence Plantations of 1643, "full Power and Authority" were given to the inhabitants "to rule themselves . . . by such a Form of Civil Government, as by voluntary consent of all, or the greater Part of them, they shall find most suitable . . . by free Consent," a proviso was added "always reserving" to the Earl of Warwick "Power and Authority for to dispose the general Government . . . as it stands in relation to the rest of the Plantations in America."

These were the constitutional foundations of the first American civil societies, societies that comprised men who believed, and to some extent rightly believed, that they were liberating themselves from the oppressions and fanaticisms of the Old World. This was the freest that the moral world could conceive itself as being, before the conceptions of Thomas Hobbes, Benedict Spinoza, and John Locke shattered its foundations. In this world, there was much talk of duty for most men, and of royal or noble and priestly prerogative for a tiny few; little talk of rights, less of natural rights, and none of the rights of man or of rights belonging to human beings simply as human beings. "Consent" was for the most part consent to the pre-

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ordained rule of divine or traditional superiors. The liberty granted to Englishmen was "the liberty of the gospel": or (as the king said in the Charter of Rhode Island of 1663) "that true pietye rightly grounded upon gospel principles . . . libertye, in the true Christian ffaith and worshipp of God . . . and loyall subjectione to our royall progenitors and ourselves . . . against all the enemies of the Christian ffaith." It was against such notions of liberty and political rights that *The Federalist* declared that "the people are the only legitimate fountain of power" (No. 49), that "the genius of republican liberty" demands that government be "strictly" republican—"a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior" (No. 37).

Yet let us not fail to pay respect to the aspirations of the early colonists, and the way of life they represented. A good introduction to those aspirations and that way of life abandoned by the Framers of the Constitution is to be found in William Penn's "Preface to the Frame of Government" for Pennsylvania (1682). The society Penn limned was one filled with devotion—familial, civil, and, most pervasive, heavenly. Many if not most of the members of such a society lived lives of quiet heroism, regularly performing feats of sacrifice, endurance, and self-overcoming of a sort we nowadays associate only with grave emergencies or peculiar, old-fashioned notions of marital fidelity and filial piety. Each individual viewed his existence in the light of a clear and all-embracing purposeful order. The imaginations of even the illiterate mass were fired, elevated, and refined by a patriotic religiosity and a religious patriotism—expressed in daily prayer, in public art, in popular saga, in music and in ceremony. Mundane life, cursed as it was with the horrors of early death, disease, and poverty, was nonetheless redeemed spiritually by the firm belief in a transcendent destiny. This belief supported and nurtured a genuine, if often ignorant, respect for the contemplative life. Thought, reflection, and rigorous self-examination, culminating in theological and metaphysical speculation, were prized even or precisely when they came into competition with economic success and civic virtue. And this means to say that virtue as a whole was understood in a manner fundamentally at odds with the moralism, activism, and communitarianism with which we have become familiar, especially under the aegis of thinkers like Kant, and more recently Arendt: The life of deeds was understood to point beyond itself, to a life dedicated to the philosophic or theological virtues.

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"Nature and Nature's God"

Once we have brought all this clearly into focus, we recognize that it is the Founders' new and radical conception of man's relation to God, and of God's place in politics or public life, that constitutes the keystone arch of their unprecedented edifice. The massive foreground is of course familiar: the disestablishment of religion, and genuine toleration for all religious, and most areligious, opinions. But with what end in view—in the name of what religious or moral principles—were these momentous policies instituted? Up to a point, the answer is reasonably clear, if not always forthrightly expressed by the Founders themselves. But as one probes more deeply into the ultimate consequences of the Founders' posture toward religion, one encounters ambiguities and hesitations; and these turn out to be the symptoms of a profound problem, or a set of unanswered questions.

From time to time leading Founders issued assurances (the most famous perhaps are Madison's, in letters to Edward Everett and a certain Reverend Adams) to the effect that the removal of political authority from the hands of clerics and the liberation of the individual conscience will foster a vibrant diversity of Christian sects. But the more authentic judgments of the most thoughtful Framers seem revealed by utterances such as Madison's letter to Jefferson of October 1787, where he speaks of how "erroneous or ridiculous" religious grounds of dissension appear to enlightened men. Jefferson himself, though he stresses that his addressees must keep his religious views secret, declares in letters to friends his confident expectation that America will soon become predominantly Unitarian (i.e., no longer believing in Christ), perhaps by the middle of the nineteenth century. In general, the Founders—including Benjamin Rush, perhaps the most pious among them—promote and look forward to a *drastic redefinition and reorientation* of religion. Christianity is to cease challenging men with an alternative, transcendent goal demanding deep inner detachment from secular existence. Instead, religion, of a generic sort, is to become a bulwark, i.e., a means, to productive economic energy and a republican political life dedicated to security, prosperity, and the protection of each individual's pursuit of earthly satisfaction.

What is more, the religion envisaged and cultivated is the religion of *reason*. Benjamin Rush insists that it is through the progress of natural science, and only through such progress, that the hitherto hidden meaning of the New Testament will be discovered: Scientific archaeology, philology, and textual criticism will exhume the *true* story of the man named Jesus—from beneath the encrustations of

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primitive ignorance and monkish guile. Jefferson went even further. Together with Joseph Priestly, he labored to produce a rewritten New Testament, purged of "the immaculate conception of Jesus [sic], His deification, the creation of the world by Him, His miraculous powers, His resurrection and visible ascension, . . . atonement, regeneration, etc." (letter to William Short of 1819). Inspired by models like Franklin's *Autobiography*, Americans are to ground their dignity on the autonomy of individual reason; they are to pursue the Good, i.e., Happiness, while looking for guidance only from nature, and the God of nature, discovered by science.

One must immediately add, however, that the Founders agreed almost unanimously on the necessity for public, civic cultivation of reverence for their new, or true, God of nature and of reason. What is more, they insisted that this God *must* be conceived as a providential and punitive God, a God of "judgment day" (as Jefferson did not hesitate to call it). Franklin delivered a passionate speech to this effect at a crucial juncture in the Convention (June 28); and Jefferson, in his sole published work, the *Notes on the State of Virginia* (Query 18), went even further: "The only firm basis" for "the liberties of a nation" is the "conviction in the minds of the people that these liberties are the gift of God," that "they are not to be violated without his wrath."

But why? What makes the Founders so convinced that divine punishment is an irreplaceable basis for human liberty? After all, Jefferson, along with other leading Framers (disagreeing, in this essential respect, with Hobbes, Locke, and Spinoza), insists that mankind is imbued with a natural "moral sense," an innate instinct or impulse that carries a human being to the aid of his fellowman, and averts him from inflicting suffering, prior to all calculation. Ah yes, but Jefferson also declares that calculation, rational calculation of personal utility or advantage, does or ought to govern this moral sense: "Nature has constituted *utility* to man, the standard and test of virtue" (letter to Thomas Law of 1814). Now Jefferson, like every other member of the generation that fought or witnessed the Revolution, knew in his very bones that republican liberty absolutely requires a citizenry ready to make sacrifices that no purely secular calculation of personal utility or happiness can unambiguously justify. Similar reflections had led Locke, long before, to declare that "the true ground of Morality can only be the Will and Law of a God, who sees Men in the dark, has in his Hand Rewards and Punishments, and power enough to call to account the Proudest Offender," in "the Hell he has ordain'd for the Punishment of those that trans-

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gress"; "without such a Knowledge as this, a Man can never be certain, that any thing is his Duty" (*Essay Concerning Human Understanding* I, iii: 6 and 13).

But how can *reason* unassisted, how can reason which has largely jettisoned mystery and miracle—and therefore the Scriptures, as delivered to us—establish the existence of such a God, such a Heaven, and such a Hell? How can reason even establish the immortality of the soul? If it cannot, if in fact scientific thought steadily renders more implausible such notions, what courses of action will be dictated by the calculus of utility that Jefferson is so certain governs the moral sense? Can a people who are taught to bow, in public life at least, only to the God of reason, and to economic utility as the guiding principle, accept the terrible financial sacrifice entailed (to take Jefferson's agonizing example) in the manumission of their slaves? Can they bear up under nature's inevitably recurrent wars, plagues, and severe economic depressions? Or will they, like so many of our contemporary utilitarians, libertarians, and economistic political theorists, be compelled more and more to drift into the inebriation of irrational hopes for "world peace," "victory over disease," and the eradication of poverty? Will citizens imbued with the religious beliefs the Founders promote be capable of facing up to the need every society inevitably has for periodic, shared or fraternal, endurance and sacrifice?

These are among the gravest questions or doubts prompted by a study of the Founders' moral vision. The gravest, however, is this: Where in the writings of the Founders or of their greatest philosophic sources is there to be found a rational demonstration of the nonexistence of the supernatural God of the Scriptures? Where is the demonstration of the existence of "Nature's God," the God purportedly discoverable by reason alone? Socrates tells us he devoted his entire life as a political philosopher to attempting to refute the Delphic Oracle. What makes these modern philosophers, and their students, so sure of themselves? What justifies their confident, magisterial judgment on and use—nay, exploitation—of texts that purport to be the words of the suprarational Almighty? How could they, as disciples of truth, march boastfully on, leaving behind them this awesome unanswered challenge and question? It would be blindness to ignore, but we cannot here do more than touch upon, this puzzle that casts its shadow over even the highest philosophic peaks of the Enlightenment. In the present context we must turn at once to lay out in more detail the rational and "reasonably" virtuous way of life the Founders propose to set in place of the old pieties.

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The unprecedented dedication to commerce

The new American republic, under the God of Nature or reason, is to be characterized by an unprecedented dedication to commerce, productive economic competition, and material enrichment. "The first object of government," Madison proclaims in the famous *Federalist* No. 10, is "the protection of different and unequal faculties of acquiring property."

> Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government.

There were of course commercial societies, and even commercial republics, prior to the American. But their devotion to commerce was always sharply checked, not to say contradicted, by devotion to religion, honor, and virtue understood as objects threatened by the luxury, factionalism, and worldly self-interest that commerce breeds. One thinks for example of Venice, perhaps the most spectacularly successful commercial republic prior to the United States: as Montesquieu had stressed, and as the Founders learned from reading Montesquieu, that success did not prevent Venice from outlawing most if not all commerce among the ruling class, or from enforcing strict penalties ("sumptuary laws") for all sorts of conspicuous consumption and luxury. America is the first republic in which there is to be no deliberate attempt made to limit or discourage preoccupation with the acquisition of property and with general economic growth.

Nevertheless, the old-fashioned worries about the deleterious moral effects of commerce and acquisitiveness remained alive among the Founders. They often spoke with a tone of resignation or even pessimism about the long-term effects of the American citizenry's preoccupation with moneymaking. Thus Jefferson, in his *Notes on the State of Virginia*, Query 17: "from the conclusion of this war we shall be going down hill. . . . the people . . . will forget themselves, but in the sole faculty of making money. . . ." Yet the same Jefferson, in a letter to Washington written not long after, insisted that Americans had no choice in this matter: "All the world is becoming commercial. Was it practicable to keep our new empire separated from them we might indulge ourselves in speculating whether com-

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merce contributes to the happiness of mankind. But we cannot. . . . We must then in our defence endeavor to share as large a portion as we can of this modern source of wealth and power." What *could* be done was to try to keep American commerce predominantly agricultural, or based on independent cottage-type industry, for as long a time as possible. Such a commercialism would less readily sap the American people's collective and individual self-sufficiency, local civic rootedness, healthy thrift, self-restraint, and invigorating physical labor.

Commerce and public spirit

Indeed, seen in this light, commerce or the preoccupation with economic growth begins to take on a distinctly moral hue. Economic opportunity ought to be opened up, not to speculators (investment bankers) and government monopolies or government-supported giant corporations and banks, but instead to steady, hard-working ordinary folk with strong family and neighborhood ties living mostly in rural environments. Then commerce may well afford a stronger incentive to civic involvement—to a communal or fraternal spirit at the local level, and to an attentive following of national politics—than did any of the older and so often unsuccessful appeals to nobility, sacrifice, and pious otherworldliness.

It was this vision that united the Jeffersonians against the economically far more sophisticated vision articulated in Hamilton's great "Report on Manufactures." Yet Hamilton and his followers like Fisher Ames were not nearly as opposed to the general drift of the thinking just sketched as they were often said to be by their victorious opponents. The Hamiltonians did raise sober doubts about what they saw as an overly romantic enthusiasm for yeoman localism, and did, with reason, insist that the Jeffersonians were failing to heed the *national* economic problems America faced as *one* people. National improvements (canals, roads, banking, shipping, etc.) and some national economic planning, regulation, and active intervention, of a judicious, limited sort, were sooner or later inevitable —and the more delay, the more dramatic would become the need. Beyond this, it was characteristic of Adams, Hamilton, Ames, and Marshall that they (in contrast to most Jeffersonians) worried about the *levelling* tendency of the new democracy: They insisted that democracy could, and for its own survival must, make room for grand political ambition and talent. They saw in a vigorous national or federal government, involved in grand economic designs, a field for the arousal and cultivation of statesmanship and the noble love

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of fame. They saw in such politics, rooted in popular election, a way to endow even ordinary Americans with a sensitivity to greatness.

In short, all parties, however bitter their differences, were seeking in commerce a means to promote more than wealth; they sought, through and along with the concern for wealth, to promote a spirited and admiring involvement in public life. They meant to cultivate citizens who, alert and engaged to protect their property, considered their dignity, their exercise of their autonomy, as a part of, and not only a means to, their property. As Madison put it in an essay on property (1792), "In its larger and juster meaning, . . . a man has a property in his opinions and the free communication of them . . . in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."

Perhaps no one captured the moral transformation that was afoot better than Noah Webster, in the remarkable essay he contributed to the ratification debates:

> *Virtue*, patriotism, or love of country, never was and never will be, till men's natures are changed, a fixed, permanent principle and support of government. But in an agricultural country, a general possession of land . . . may be rendered perpetual, and the inequalities introduced by commerce, are too fluctuating to endanger government. An equality of property, with a necessity of alienation, constantly operating to destroy combinations of powerful families, is the very *soul of a republic*. . . . But while *property* is considered as the *basis* of the freedom of the American yeomanry, there are other auxiliary supports; among which is the *information of the people*. In no country is education so general—in no country, have the body of the people such a knowledge of the rights of man and the principles of government. This knowledge, joined with a keen sense of liberty and a watchful jealousy, will guard our constitutions. . . . But a principal bulwark of freedom is the *right of election*. An equal distribution of property is the *foundation* of a republic; but *popular elections* form the *great barrier* . . . (Webster's italics).

Access to property opened up to all through commerce, combined with fervent emphasis on education—education in political theory, in the rights of man and the rule of law, law understood not as handed down from on high but as enacted through elected representatives: This is the great replacement for traditional virtue. One may go a step further. As James Wilson argued in a famous lecture attended by President Washington and his cabinet, this educated attachment to liberty and to law, understood in the new sense, may be said to be *the* American virtues: "When some future Xenophon or Thucydides shall arise to do justice to their virtues and all their

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actions; the glory of America will rival—it will outshine—the glory of Greece. Were I called upon for my reasons why I deem so highly of the American character, I would assign them in a very few words . . . the virtues . . . descriptive of the American character [are] the love of liberty, and the love of law" ("Of the Study of Law," 1790).

Family life as spiritual life

The lecture from which these last words are taken deserves and rewards our closer attention. It represents not only a considered statement by a leader in the Convention and in the ratification debates, but something more, something that makes it unique. It is a solemn, inaugural, academic lecture in political and legal theory delivered, very self-consciously, to an audience including many or most of Wilson's greatest fellow Founders—to whom Wilson explicitly refers and whom he even directly addresses in the course of his presentation. We must therefore be especially interested in what Wilson goes on to say about the nature and content, or highest employment, of the liberty to which Americans and the American Constitution are dedicated.

Wilson makes it clear that liberty, as he conceives it, bows to, but certainly does not culminate in, political life. On the other hand, the *social* life which he sees politics as ultimately serving is not simply or even chiefly commercial, or property oriented. For Wilson, man is by nature a *social* rather than a *political* animal; and his sociability flowers, it attains its natural beauty and pleasure, in a sphere that can and should be somewhat insulated from *both* economics and politics. In a remarkable peroration, Wilson turns suddenly to the wives of the dignitaries assembled: "Methinks I hear one of the female part of my audience exclaim—What is all this to us? We have heard much of societies, of states, of governments, of laws, and of a law education. Is everything made for your sex?" His answer is lengthy and fascinating, but its nerve is this:

> You have, indeed, heard much of public government and public law: but these things were not made for themselves: they were made for something better; and of that something better, you form the better part—I mean society—I mean particularly domestic society: there the lovely and accomplished woman shines with superior lustre. . . . In the just order of things, government is the scaffolding of society: and if society could be built and kept entire without government, the scaffolding might be thrown down, without the least inconvenience or regret.

Wilson here makes explicit a theme that one finds struck over and over in the letters of the Founders, but to which they only barely allude in most of their businesslike public statements. Family life,

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hearth and home—ruled by the father; graced, elevated, and softened by the virtues of the mother—is the spiritual heart of the America the Founders cherish in the present and envision in the future.

Yet the family as the Founders know and cherish it remains the traditional family: it remains, that is, a version—softened and modified already, but still a version—of Biblical and Aristotelian patriarchy. Rarely if ever do the Founders raise or face the question, what may become of the patriarchal family as they know it in the new, intensely individualistic and commercial moral order they are bringing into being? They seem implicitly and trustingly to assume that the family as they know it will wax stronger. They greet with enthusiasm the new stress on alienable property, and hence the destruction of primogeniture, entail, and traditional doweries. They see no danger in the new insistence on an assertive individual liberty as the chief source of human dignity; in the cultivation, as the highest duty, of a jealous watchfulness over individual rights; in the new emphasis on contractual relations as the basis for all permanent human relations. These critical moral innovations, and the drastic dilution of the authority of Biblical sanctions against divorce, infidelity, neglect of aged parents, and child abuse are not supposed to corrode the lifelong commitment of spouses to one another and the reciprocal ties between parents or grandparents and children.

One is tempted to say that the Founders could not allow themselves to hear or see the full implications, for the family, of their moral principles. Yet on rare occasions a note creeps in suggesting the awareness of future tidal changes. John Adams, alerted perhaps by many long arguments with his spirited wife, responded in 1776 to a plea for extending the vote to the poor with the following uneasy reflection:

> The same reasoning which will induce you to admit all men who have no property, to vote, with those who have, for those laws which affect the person, will prove that you ought to admit women and children; for, generally speaking, women and children have as good judgments, and as independent minds, as those men who are wholly destitute. . . . Depend upon it, Sir, it is dangerous to open so fruitful a source of controversy and altercation . . . new claims will arise; women will demand a vote; lads from twelve to twenty-one will think their rights not enough attended to . . .

For a long, long time, the humanly most revolutionary consequences of the Founders' philosophic principles remained largely hidden or restrained by habits and institutions that were only very gradually being corroded by the acid of modern natural rights. But today those consequences have become clearly visible in our daily lives. The shift from the extended family to the nuclear family and

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finally to "no-fault" divorce; the sexual revolution, then women's liberation, and finally children's liberation and abortion-on-demand: These are only the most obvious symptoms of the disintegration of the family as the Founders knew it or imagined it might be in the future. The point is not that we ought to blame the Founders for our very grave difficulties. We may indeed lament the fact that they failed to think through the full meaning of the moral revolution to which they contributed so much. But this only serves to make our task clearer. We must think through the full meaning—the presuppositions and implications—of that moral revolution. We must reenact, for and by ourselves, the great debates between the Founders' new individualism or egalitarianism and the old Biblical, and classical, conceptions of the human condition. Only if we engage in such an original reenactment and rethinking will we truly understand the unfolding moral imperatives that have shaped, and are coming to shape ever more explicitly, our civic culture and our family and personal lives. This kind of rethinking is the essential precondition for our dealing in a self-conscious or wise way with the baffling, unanswered questions—about the family, about God and politics, about the grounds for civic virtue and sacrifice—that have been bequeathed to us as part of the legacy of the Founders.

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Factions and incentives in Congress

MICHAEL J. MALBIN

MORE THAN HALF of the recorded debates at the Constitutional Convention were about how to organize Congress and what powers to give it. Today, the organization of Congress continues to preoccupy its most frequent critics. The institution, they say, is too much concerned with local interests, too fragmented internally, and too susceptible to interest group pressure. If you take the word "too" out of the last sentence, the description is largely correct. Unfortunately, it tells only part of the story. To assess Congress's role and development fairly, we must first address some broader questions about the constitutional order.

The Framers' intentions

The main issue at Philadelphia was whether there should be a national government at all. By deciding that issue in the affirmative, the delegates took the single most important step to constitute a country whose people would have a multiplicity of interests. The basis of faction may be sown in the nature of man, as James Madison said, but the large, commercial republic encouraged faction —deliberately. Diversity was meant to make certain *kinds* of decisions more difficult and less likely.

Specifically, the Framers thought a country large enough, and an economy vibrant enough, to stimulate a broad range of differentiated

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interests would produce a somewhat depoliticized citizenry. The people would be more concerned with their private rights and preventing the government from usurping those rights than with trying to gain control over the institutions of government to impose a single point of view or a single class interest on the whole country. The government was to provide for the common defense and create the conditions for a healthy interstate commerce. But if the country were sufficiently diverse, and diversity were supplemented by checks and balances, people would consider it futile to try using the government to promote ends that elsewhere had produced religious (seventeenth-century England) or economic (Shay's Rebellion) violence.

The Framers believed most voters in a liberal democracy would be concerned primarily with their immediate well-being and would try to turn the government toward serving it. Much of the Framers' discussion of Congress was about how best to counter this pressure. But that discussion took place within a framework in which at least the Federalist side of the ratification debate wanted to encourage private interests to develop. The Federalists were not interested in solutions that would work against the diversification of private interest because that would mean courting the dangers of polarization and civil war.[1]

As a price for encouraging this beneficial diversity, the Framers were willing to accept the inevitability of factional or special-interest influence in politics and government. Nevertheless, they also believed a successful government had to transcend faction to work for the common good.

How did the Framers hope to achieve such a result? One way they would *not* proceed was by trying to make sure virtuous politicians would always be in office. When they designed the institutions of government, the Framers assumed public officials often would act out of self-interest. To that extent, their perspective looks like some strands of contemporary public choice theory. The Framers differed from these contemporary theorists, though, in the breadth of their view of self-interest, which is what allowed them to rely on self-interest to serve public ends. The argument, in truncated form, was:

[1] The fact that the country had a civil war does not mean the Federalists were wrong. Some issues run so deep that they overwhelm the factional interests the Federalists were trying to promote. Slavery was one such issue. So were the ones that produced the country's few major political party realignments. But even though realigning issues may arise every generation or so, despite the Constitution's institutional arrangements, countrywide cleavages are much less likely to occur in the United States than elsewhere.

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(1) Self-interest involves a complicated set of passions.

(2) People who seek political office often define their self-interest in terms of ambition or love of honor as well as material well-being.

(3) Institutions can be shaped to encourage, control, and then channel ambition toward politically desirable ends.

The notions of self-interest and ambition pervaded the Framers' analysis of government institutions. Consider the issue political scientists now describe as "candidate recruitment." No legislature would ever withstand constituency pressure if all of its members' perspectives simply matched those of the voters. The difficult task was to combine responsiveness with some perspective. One precondition for perspective was a legislature at least some of whose members had ambitions or concerns larger than the district. Another was that they had the ability to act on those ambitions or concerns competently.

During the Revolutionary War, Congress was made up of an impressive collection of delegates. As historian Jack Rakove has written, "attendance at Congress (during the war) was . . . an obligation to be discharged, not an ambition to be fulfilled." Afterward, however, the day's leading political figures were no longer willing to serve. With no emergency and a weak Confederation Congress, many of them preferred returning to their state legislatures. Alexander Hamilton said it became "difficult to find men who were willing to suffer the mortification to which so feeble a government, and so dependent a station, exposed them."

The most important step the convention took to attract able people to Congress was to make the national government more powerful. Next, the delegates turned to the selection process itself. They wanted to give the edge to the kind of representatives and senators they hoped would serve. For the House, large districts—about thirty thousand people to start, or ten times as populous as a good-sized state legislative district of the day—were thought to favor people with earned reputations over those who might buy their elections through friendship or bribery. As for the Senate, indirect elections would work even better than district size. It was assumed that state legislators would want someone competent to represent the state's interests in the national legislature.

But persuading able people to serve can only do so much. The problem with which the Framers grappled was to get Congress to rise above the factional diversity the Constitution would stimulate. If local factions were the only source of rewards and honor, politicians would behave accordingly.

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So the trick was to create incentives that would persuade at least some members to look beyond their own districts' immediate passions. The Framers' most obvious devices related to the length of House and Senate terms, the size of congressional districts, and the size of the House and Senate. More circuitous, but still important, was their reasoning about how politicians would gain power within the House or Senate, and how they would advance from one office to the next.

The deliberative Congress

Two-year House and six-year Senate terms were supposed to give members of Congress some "breathing room" to stand up to the short-term wishes of their own constituents. But these House and Senate terms were also supposed to serve another important purpose. By reducing the need to travel back home for annual elections, several convention delegates said they hoped less harried members of Congress could spend time living in the nation's capital. The aim was to create personal and working relationships among the members, apart from the home district or state. The perspective of 1787 clashes with today's complaint that the government wears Washington blinders and ignores the rest of the country. The issue two hundred years ago was how to build a common set of experiences and a common sense of purpose among people with strong local ties.

The concern about building a common purpose tied directly to the way the Framers hoped Congress would work. Diversity was supposed to make it all but impossible for members simply to vote raw policy preferences up or down. The need to forge majorities out of diverse factions would force bargaining and compromise. At a minimum, legislative bargaining should help to moderate policy decisions. At its best, though, deliberation can rise above mechanical split-the-difference compromising to produce serious discussions among people with different interests, from different backgrounds, each genuinely trying to serve a national interest, rather than a series of parochial interests.

Group discussions are needed for legislative deliberation for at least three different reasons. First, as Oliver Ellsworth told the Constitutional Convention: "The Legislature will not know till they are met whether the public interest required their meeting or not." Without discussion, the members cannot know whether problems in one district occur elsewhere too. Second, the Framers recognized that members will disagree about ends as well as means and there-

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fore cannot limit themselves to a technocratic search for the best technique. Finally, in a democratic republic, it is just as important to gauge what is acceptable as to know what is workable. If a significant number of people disagree with what an officeholder proposes, the Constitution is designed to force the officeholder to give up or to persuade the people to change their opinions. Deciding when to give up and when to persuade is the essence of democratic leadership.

To encourage deliberation, the Federalists argued hard for small legislative chambers, which automatically required relatively large House districts. Large legislative bodies, the Federalists argued, inevitably became dominated by a few demagogic leaders. "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob," wrote James Madison in *Federalist* No. 55. Small chambers permit direct discussion, and only with such discussion does serious deliberation become possible. Large House districts also increase the odds that each representative will have to appeal to a coalition of diverse interests to win an election. Members who have to live with diversity within their own districts are more likely to understand the importance of compromise than members from monolithic districts.

The more circuitous methods the Framers used to encourage deliberation had to do with the members' future career plans. The House of Representatives was the only branch of the federal government elected directly by the people. All other federal offices, including the Senate and Presidency, were filled either by appointment or by indirect election. No House member could advance to another federal office without first passing through some sort of judgment by political peers at the national or state level. Ambition for higher office would force the member to look beyond the immediate wishes of a local constituency. Concern for the respect of one's colleagues, therefore, would be an important counterweight to constituency pressure for the ambitious politician. The best way for an ambitious politician to gain his colleagues' respect would be by the way he performed in office over the long term.

Interestingly, this was also the best way in the early years to exercise influence within Congress. Under the procedures of the early House and Senate, bills were considered and approved in principle by the Committee of the Whole before they were sent to a select committee to be put into legislative language. Anyone who wanted to move a policy idea forward first had to persuade a majority that the idea was worth pursuing. Deliberation by the whole

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body, in other words, preceded the markup by specialists. The process permitted the real leader of the first House to be James Madison, who held no formal post, rather than the Speaker, Frederick Muhlenberg. House members looked to Madison partly because of his abilities, but also because the institution encouraged members to seek deliberative solutions to issues.

Tinkering with the machinery

In the two hundred years since the Constitutional Convention, many of the mechanisms the Framers hoped would give politicians an incentive to work for the national interest have disappeared or have been radically altered. Senators and presidents are now elected directly (or all but directly) by the people. Two-year terms work differently with an expanded governmental agenda. So too do elections. Congress did develop new mechanisms, along with its party and committee systems, that helped balance constituency pressures for some key committees and helped enhance some members' attachments to the House and Senate. Many of these mechanisms have been weakened in recent years, however. Before we try to assess the balance, it would be worthwhile to catalog some of the more important changes.

Senate and Presidency. The direct election and nomination of senators and the all-but-direct election and nomination of presidents have removed peer review as an immediate strategic consideration for politicians seeking higher office. For all practical purposes, candidates can now appeal directly to the electorate with little or no reference to how effectively they performed in their previous office. The Democratic Party rules that made officeholders unpledged delegates to the 1984 national nominating convention may change this situation slightly. Republican Senator Robert Dole might also change it slightly if he defies recent history by turning a party leadership position into an effective launching pad for the presidency in 1988. Even with such changes, however, the basic direction of the past two hundred years has been away from peer review and toward direct election. The obvious implication is that ambitious politicians have to worry more about pleasing primary voters (or potential contributors, volunteers, and other supporters) and less about pleasing colleagues with high-quality legislative work.

Two-year Terms. The delegates to the 1787 convention thought two-year House terms would give Congress plenty of time for its legislative work. One of the delegates, General C.C. Pinckney, even told the South Carolina ratifying convention that he thought congressional sessions would last only a few months per year.

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But the agenda grew during Congress's first century, and sessions became longer. After the New Deal (or maybe, as Nelson Polsby says, it was after air conditioning made Washington summers bearable), Congress became an overloaded year-round institution. Today's Congress routinely has bills stacked up at the end of each cycle. Because most members want to get home for the election campaign, the logjam gives a handful of members a potent weapon—the threat to delay adjournment—to use against bills they oppose. Bills pass or fail because of parliamentary maneuvers that favor determined minorities.

A majority can defeat these end-game tactics if a strong enough consensus determines that a particular bill must pass. Appropriations bills or omnibus continuing resolutions almost always are treated as "must" bills. The political mood usually favors a few other items each year. But even passing "must" bills has a price: Swing-vote legislators can use the calendar to demand a stiff *quid pro quo* before they say yes.

If the legislative cycle no longer fits neatly within the two-year time frame the Framers envisioned, neither do election campaigns. At the Constitutional Convention, one-year terms were rejected because they would require members to engage in a permanent campaign. But the two-year cycle means just that for House members today. From the moment freshmen Congressmen hit Washington, they busily cultivate their new constituencies to prepare for the next election. Serious challengers and open-seat candidates also routinely run campaigns that last at least eighteen months. It can take that long under the post-1974 campaign finance laws to raise the half-million dollars or so the average winning challenger spends on a successful campaign. Over the past ten years, some challengers have even begun to adopt a four-year game plan, using one election to weaken incumbents and establish their own credibility in the hope of winning the next time around.

Proposals abound to address these concerns by lengthening congressional terms to three or four years. There is no way to make such a change, however, without either changing the terms of senators and presidents or radically altering the relationships among the separate branches. In fact, most people who propose four-year House terms explicitly intend to strengthen the President's political control over Congress. This issue will be addressed briefly in the conclusion.

Linking voters and legislators

Elections and Campaigning. Underlying the argument about term lengths during the ratification period was an agreement among

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Federalists and Anti-Federalists that voters should and would consider a legislator's record during reelection campaigns. Today's incumbents, however, do everything they can to avoid being judged on their substantive policy positions. The average House member spends more than one million dollars every two years to become better known by his constituents.[2] Some of this money is spent to explain the incumbent's positions on major national issues, but a great deal goes to project the incumbent as a person who can get jobs for the district or help ordinary people with bureaucratic problems. In addition, most House members outside large, metropolitan areas are able to dominate local news coverage from Washington. By the next election day, almost every potential voter can identify the names of most House members; only about a half can identify the challengers'. Moreover, the incumbents are more than just empty names; most tend to be liked or trusted, even by voters who do not share the incumbents' policy preferences. As a result, incumbents benefit substantially from split-ticket, cross-party voting at the congressional level. No wonder more than 90 percent of the House members who seek reelection win.

That does not mean issues have become irrelevant to campaigning. Recent research shows that voters do apparently exercise some retrospective judgment as they cast their ballots for Congress. The electorate regularly uses its opinion about the party in control of the White House (selectively, with great variation across congressional districts) against incumbents identified with national policies of which the electorate disapproves. In some years, the voters are fairly precise in their targets; in other years, far less exact. In most years and in most districts, though, the voters' policy judgments do not seem to weigh as heavily as their positive assessments of the incumbents as people.

This kind of retrospective judgment is a far cry from what Federalists and Anti-Federalists were debating in 1787. No one ever thought most voters would devote the time, or have the perspective and inclination, to make a fair assessment of all aspects of a representative's performance. That was why, after all, the Framers thought there had to be incentives for members to concentrate on

[2] This is a conservative estimate that only counts what the average member spends on personal district staff, other district office expenses, a small percentage of the budget for the Washington office staff, and the value of free postage for mail that is initiated by the office. It does not count mail sent as a direct response to a letter from someone else, the value of free radio and television studios provided by the congressional parties, or other important benefits whose value is hard to quantify from readily available data.

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matters their own constituents might not reward. But the Framers did think voters would judge how a representative's actions affected the voters' own immediate interests. Even this sometimes seems too much to ask with today's expanded agenda. Most of the members' serious legislative work is too complicated to be portrayed in the quick news quotations or thirty-second television ads that are the staples of modern campaign communication.

The incumbent's record may come into the campaign, but usually as a "character" issue (such as attendance record, junkets, and undue influence), a snapshot of the incumbent's votes on selected roll call votes, or a charge raised about one of the few other aspects of an incumbent's work that an opposition research staff can examine with a computerized data base. Representative X will be described in painfully oversimplified terms as being for or against (or flip-flopping on) the elderly, economic growth, runaway spending, dictators, national defense, and so forth. Because parliamentary contexts can be hard to explain in a campaign, the only safe defense for the incumbent is to cast every vote with its possible future campaign use in mind.

The Washington Perspective. Direct communication between the candidates and the voters is not the only way voters learn about the issues, of course. National interest groups hire professional staffs to follow Congress closely and inform their own followers what the incumbents are doing on the groups' issues. This kind of information sometimes says more than all of the charges and countercharges from the candidates themselves.

Mentioning interest groups brings to mind one final alteration in the Framers' use of the two-year cycle to promote deliberation. The original idea was that two-year House and six-year Senate terms would lead members to spend time living in the capital city. This in turn would help the legislators build a sense of common identity and purpose that would further their deliberations in a setting removed from the immediate pressures of their constituents.

The growth of national interest groups in Washington has changed all this. This growth has directly paralleled, and is in some ways another consequence of, the growth of the government's agenda. The first umbrella groups for business and labor grew with the nationalization of the economy and the first major stirrings of national economic regulation at the end of the nineteenth century. They continued to grow in spurts that roughly matched the Progressive Era, the New Deal, the Great Society, and, finally, the expansion of health, safety, environmental, and civil rights laws and regu-

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lations of the mid-1960s through early 1970s. The result has been an explosion of interest group representation in the nation's capital.

Interest groups do play important and useful roles for an expanded government. One reason deliberation could not be a solitary activity, it will be remembered, was that discussion helps members become aware of what other districts need. With the agenda's expansion, and especially with the growing importance of technically complicated issues, the members need help to see how people think they will be affected by legislative proposals.

Interest groups also act as important links between Washington and the voters, especially since the 1974 campaign finance law stimulated them to become actively involved in election campaigns. Electoral participation by individuals with economically interested axes to grind is as old as the republic. But the formal participation of groups as groups dates only from labor's involvement in the 1930s. Now there are more than four thousand political action committees (or PACs) registered under the 1974 campaign law. These groups do not merely inform. They put an electoral cost or benefit on how well a member listens. As a result, the groups not only link legislators to their constituents, but end up intensifying the pressure from that linkage.

Internal incentives

Parties and Committees. Some of the changes in Congress over the past two hundred years helped create incentives the Framers might have thought beneficial. Political parties and standing committees began forming during the Constitution's first decade, and a full standing committee system was put in place between about 1810 and 1825. The committee system did not grow *because* members were trying to create incentives for themselves, but it created two sets of them nonetheless: incentives to serve on and lead the committees, and incentives to be in a position to name who will serve.

For most of the committee system's first century, party leaders had the formal or informal power to select committee members and chairmen. Over the course of that century, however, a custom developed that used seniority to pick chairmen and reassign old committee members. After 1910, the custom was solidified. From about 1920 until 1974, committee seniority was followed with only rare exceptions. Effectively, this meant that party leaders would get to reward or punish members primarily when the members wanted to change their committee assignments. Even this limited power, though, was used by the party leaders to create incentives for behavior that concerned the Framers.

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The leaders often used their most prestigious committee assignments to help members who were willing, and electorally safe enough, to stand back from constituency pressures—if not for the good of the country, then at least for the good of the House or party. (The other side of the coin was that constituency pressures were heightened on less prestigious committees because the leaders let members pick lesser committees that served their own districts' needs.) According to Richard Fenno's *Congressmen in Committees*, written at the end of this period, the leaders tried to pick "responsible" members for Appropriations and for Ways and Means. The two committees were structured deliberately to help members withstand local pressures as they decided money issues crucial to the House's view of its distinctive institutional role. To help them perform this task, the committees were made two of the three most powerful *within* the chamber.

In addition to their use for key committee assignments, the leaders seem to have used the same "responsibility" requirement to screen members for junior party leadership positions. For both leadership and key committee assignments, "responsibility" seems to have meant a willingness on important occasions to help the leaders advance party positions or help the two key committees achieve workable compromises on taxation and spending, even if that meant resisting constituency pressures or moderating a personal policy preference.

Thus, the message coming from the incentive structure that existed into the 1970s was clear: Anyone who wanted to become one of the House's most powerful members had to avoid using the constituency as a benchmark for every vote and behave in ways the leadership considered responsible. The concomitant message was also clear: Members who were willing to settle for less institutional power were permitted to pick committees that would help them adopt postures as constituent representatives. Until the growth of "backdoor spending," however, these latter members could not get their projects through Congress without first passing through the gatekeeper money committees.

Legacy of reform

The reform period that ran roughly from 1959 to 1977 in the Senate and from 1969 to 1975 in the House brought about many changes in the House's and Senate's incentive structures. Broadly, the reforms decreased the power of committee chairmen and increased the power of individual members by placing subcommittee jurisdictions, assignments, chairmanships, and a minimum number of staff positions outside the control of full committee chairmen. Junior

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members of both chambers were given easier access to major committee and subcommittee assignments. Junior senators and mid-level House members also had their positions enhanced by rules limiting the number of subcommittee chairmanships any one member could hold.

Party leaders were left with an ambiguous legacy. Some of their formal powers were increased. The Speaker gained greater control over the House Rules Committee, and both chambers' leaders became more able to influence committee schedules by referring bills to more than one committee. In addition, anything that weakened full committee chairmen could help the leaders work around chairmen whose policy inclinations clashed with the party. On the negative side, the leaders lost some of their informal power over junior members' careers. Some of this loss resulted directly from rules that decreased the leaders' personal discretion in the committee assignment process; the rest resulted indirectly from decisions that made members more equal, thus reducing the value of whatever rewards the leader could still distribute.

The personal power of party leaders is not all there is to the role of party, of course. Collegial party structures became more important after the reforms, both for their formal powers to choose chairmen and for the informal forum they gave members to express candid opinions about pending legislation. The new budget process enacted in 1974 also became a potential force for greater party or full chamber control over the committees, when members wanted to use it that way.

Finally, the movement toward openness—open committee meetings and recorded roll call floor votes—meant that members who wanted to "give" a vote to their party or committee leaders had to do so in the full glare of constituency and interest group pressure. Openness, therefore, decreased the effectiveness of "inside" pressures and incentives, and increased the power of outsiders.

About five years after the reform period, the critical consensus was that Congress had all but swept away the incentives that encouraged the full House and Senate, or the parties in either body, to consolidate around national policy interests. Burton Sheppard's recent judgment of the postreform House could, except for its first sentence, have been stated equally for both chambers:

> The predominant original goals of Party reformers were greater party leadership, programmism, and discipline. However, the result was substantially less of each. The movement was sharply toward the entrepreneurial, individually beneficial politics of every member for him or herself. . . .

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> To the extent that greater fragmentation made Congress less able to speak with one voice or concur on basic policy, the post-reform Congressional structure also made Congress less cohesive as an institutional counterbalance to the President. However, to the extent that the increasingly diffuse and rambling structure of Congress defied *anyone's* attempt at domination or even persuasion, the Congress had made itself (at least in part) all the more impervious to attempts by the President (or others, including programmatic liberals in Congress) to achieve broad policy goals. (*Rethinking Congressional Reform*, pp. 303-304.)

Many observers would not have questioned this analysis in the late 1970s, when Sheppard seems to have done most of his research. (Unfortunately, this otherwise good book was published in 1985.) From today's vantage point, however, we see that even though the judgment may still have a great deal of truth to it, the full picture is more complicated.

The Congress of the 1970s was an institution that was well designed by programmatic liberals to let them introduce and publicize new domestic policy initiatives that would have been buried by a Republican president and Southern conservative committee chairmen. Many of the ideas promoted by the new subcommittee chairmen and their staffs eventually became law. Outside of foreign affairs, therefore, the view that reform frustrated the government's ability to act just does not hold water.[3] It is true that a Congress well designed to promote, publicize, and initiate may have a harder time than its predecessors in bringing some issues to a vote—but remember that fractionalization meant an increase in the total number of issues during the 1970s.

The more basic charge of congressional critics concerns the fact that Congress has a hard time passing broad domestic policy programs with diffuse benefits and costs concentrated among well-mobilized constituencies. President Carter's original energy package is an example. The charge is certainly valid, but the reason is not because of a recent fractionalizing of power. The energy program and some of Carter's other "comprehensive" domestic policy reforms divided the majority party and united the opposition. It is difficult to imagine any Congress of the post-1920 era adopting any equally sweeping set of new government initiatives under those partisan

[3] The reason decentralization works out differently in foreign affairs has to do with the importance of consistency and secrecy. In both domestic and foreign policy, letting more than 250 subcommittee chairmen control their own agendas also gives them the power to discover and expose information the executive prefers to keep secret. On most domestic issues, exposure cannot lead to a change in policy without subsequent action by a majority of both chambers. In foreign policy, the mere fact of exposure can have significant consequences, as can repeated votes that suggest a national inconstancy to foreign officials who do not understand U.S. politics.

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conditions. Moreover, the budget cuts of the 1980s and the tax reform law of 1986 also asked clearly identified constituencies to pay the price of a diffuse general good. What finally passed may not satisfy purists, but the general thrust shows that Congress can adopt major policy changes in the face of a cost-benefit calculus the critics say should have foredoomed any action at all.

To portray Congress solely in terms of programs that do *not* pass misses some important lessons of the 1980s. Some major programs do become law. The House and Senate of the 1980s, despite the fact that so many of the incentives for internal cohesion have been weakened, have both shown a remarkable ability to work cohesively —sometimes across parties and sometimes within them—on complicated and highly divisive policy issues.

How do we explain this situation?

First, divided party control of the House and Senate from 1981 through 1986, and policy differences between Senate Republicans and the Republican President, gave the members of each chamber an incentive to develop their own institution's point of view to withstand that of the other branches (see *Federalist* No. 51).

Second, the two majority party leaders of those years, retired House Speaker Thomas P. O'Neill, Jr., and Senate Republican leader Robert Dole, learned how to operate in the postreform environment, skillfully using informal, collegial meetings to develop party positions on key budget issues. The result enabled the House and the Senate to come up with fairly coherent packages for the day's major budget issues. To the extent there was stalemate, it was not because of what was happening *inside* any of the branches, but because the House, Senate, and President could not agree on priorities *across* the branches of government.

Finally, the party leaders were helped by the character of the main agenda items. When budgets are tight, every member has to look over every other member's shoulder because one member's legislative success can mean less money available for what another member may want. Thus, the 1980s agenda of budget cuts and fiscal restraint has forced the two parties in the House and the Senate to work harder at developing united fronts on budget than on nonspending social or foreign policy issues. If this is to continue beyond 1986 depends on whether the budget remains the dominant agenda item, or whether Senate Democrats choose, after their election victory, to launch investigations and introduce policy innovations to emphasize their differences with a Republican President. The latter course would mean a renewed lease for entrepreneurial subcommit-

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tee chairmen. Whichever course they may take, the point here is that the agenda directly affects how fractionalized or cohesive Congress looks, even though rules and procedures remain constant.

What incentives are left?

Why do members still care about anything but pandering to their constituencies to preserve their jobs? Some do not, of course. But Congress's legislative record forces us to ask why *any* members should be willing to force hard choices on themselves and their colleagues for the sake of something that does not clearly and immediately benefit their own constituents? The answer gets back to the Framers' starting point: the importance of political ambition. We can look at the issue, much as the Framers did, by considering who chooses to serve and how members gain power within the institution.

The Framers seem clearly to have been correct in thinking that a powerful national government would attract a capable group of representatives to Congress. In the nineteenth century, the growth of the government's agenda and the growth of congressional careers went hand in hand. In recent years, the dispersion of power within Congress, combined with the continued growth of the agenda, seems to have sharply decreased the number of members who want to serve in Congress solely for the pay check and do nothing more with the job than perpetuate themselves in office. I have the distinct impression (it would take empirical research to prove the point) that because junior members can exercise power more quickly today, candidates with larger ambitions are gradually replacing Congress's least able members.

This is not meant to portray the new members as self-denying ascetics. The members use the perquisites of office, and they act to preserve their own jobs. But for many—I suspect an increasing number—the job is worthwhile because it gives them a chance to exercise power over some portion of federal policy.

If these members did not care about power and policy, they would be more willing to let others exercise power in their names. The increased prominence of floor amendments and collegial party meetings, and the concomitant decline in the deference members pay to committee expertise (shown in recent research by the Brookings Institution's Steven Smith), are signs of the importance today's members place on not being left out of key policy decisions. Fractionalization, therefore, seems to be both a cause and an effect of having members who care about results: a cause for the way decentralized power influences the career decisions of potential candi-

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dates; an effect for the aggressive way the new members insist on using the power the postreform Congress gives them.

Finally, the division of labor within Congress still creates incentives for some members to rise above the immediate concerns of their own district. Committee members and chairmen worry about preserving their committee turf and enhancing their own reputations. Even though leaders have fewer levers for forcing followers to behave in a statesmanlike way, the followers' own expectations still create incentives for party, committee, subcommittee, and *ad hoc* coalition leaders to raise issues that force Congress to behave like something more than an instantaneous reflection of their constituencies.

Constitutional reform?

The interesting constitutional question is whether these remaining incentives are enough for Congress to do what the Framers intended or the country needs. Let us deal with the Framers' intentions first. Congress is no longer a body that calmly deliberates only a few major issues of national policy. Hence, the specific incentives the Framers put in place for promoting deliberation are no longer adequate. Many of the related institutional incentives Congress subsequently created also have been eroded. But this negative line of analysis can be taken too far. There is no reason to romanticize the heyday of committee chairmen or to treat the brief late-nineteenth-century period of strong party dominance as a model of legislative performance. More importantly, for anyone looking toward future change, there is no reason to believe the majority of members who benefit from decentralized power would willingly vote to turn their own power over to someone else.

To a large extent, the growing governmental agenda has been responsible for many of Congress's institutional changes. It would be well to remember, therefore, that the agenda grew because democratically elected politicians reacted to, and sometimes helped stimulate, public demands that flowed from a nationalized economy and a nationalized system of communications. The Framers surely did not anticipate the entitlements and "rights explosion" of recent decades. But the Federalist side of the ratification debates did want a thriving, national, commercial economy. To whatever extent the subsequent institutional changes produced results the Framers might not have wished, they cannot be said simply to counter the Framers' intentions. The most that can be said is that the Constitutional Convention's desire for a calmly deliberative Con-

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gress with a light legislative agenda was in tension with the Hamiltonian Federalist desire for a nationalized economy in which citizens would look toward the national government for political leadership.

The scope of the government's contemporary domestic agenda, as well as the country's post-World War II role as a world power, are precisely what lead many critics to see the Constitution, and the Congress it helped create, as hopelessly outmoded dangers to the nation's future. What the country needs, the critics maintain, is a government that is able to govern. By this, the critics usually mean a government in which Congress will follow the President's lead on all major policy issues. To achieve this end, the critics want to make the system more like a parliamentary one by tying the elections for both branches more closely together. Underlying the many different mechanisms proposed to achieve this end is a desire for a more disciplined party system in which one election would leave the same party in control of the House, Senate, and presidency, and majority party members of Congress would have direct career stakes in adopting the policies of their party leader, the president.

There are serious problems with this approach. If we assume disciplined political parties—not very likely in this country—there are only two possible results. The more likely, given the country's diversity, would be a multiparty system. Such a system would simply move bargaining away from Congress to another collective body, a cabinet if the government were to adopt a pure parliamentary form. This, however, would by no means guarantee a government better able to act than the one we now have. The other possibility would be a disciplined two-party system. But two-party discipline presupposes either a country much less diverse than the United States or one that has become so polarized by deeply divisive issues that the electorate would be willing to accept the system's inherent limitation of choice. Any effort to impose two-party discipline on a system that did not meet these conditions would fail unless it could raise the potential costs of winning or losing enough to stimulate the required political intensity and bipolarity. The cost of two-party discipline, in other words, would mean endangering the most fundamental of all the constitutional decisions taken in 1787: the decision to encourage diversity as part of an effort to preserve liberty and make politics less of a life-and-death matter than it can be in small republics.

We come in the end, therefore, pretty much full circle. It turns out that the institutions the Framers designed are well matched to the Constitution's most fundamental purposes. If those purposes

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remain desirable for the Constitution's third century—as I believe they do—it means that institutional changes should be kept fairly marginal. In addition, if one accepts the unlikelihood of reversing past decisions to decentralize power, it means that future changes should aim to buttress collegial mechanisms that increase the incentives for cooperation, without necessarily making the mechanisms coercive. The congressional budget process has proved to be one such mechanism—especially under the fiscal agenda of the Reagan years. Multiple committee referrals, party caucuses, and the increased electoral role of the congressional party committees are some more. Other methods surely can be found in the future to do similarly integrative jobs. All of these changes, however, would involve only statutes and congressional rules of procedure. The Constitution itself is well suited to do what the country needs.

STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

(Required by 39 U.S.C. 3685)

1A. Title of Publication: *The Public Interest*. 1B. Publication No.: 00333557. 2. Date of filing: December 29, 1986. 3. Frequency of issue: Quarterly. 3A. No. of issues published annually: Four. 3B. Annual subscription price: $18.00. 4. Complete mailing address of the known office of publication: 10 East 53 Street, New York, N.Y. 10022. 5. Complete mailing address of the headquarters of general business offices of the publisher: 10 East 53 Street, New York, N.Y. 10022. 6. Full *names and complete mailing addresses of Publisher, Editors and Managing Editor: Publisher*, Warren Demian Manshel, *The Public Interest*, 10 East 53 Street, New York, N.Y. 10022. Editors, Irving Kristol and Nathan Glazer, *The Public Interest*, 10 East 53 Street, New York, N.Y. 10022. Managing Editor, Daniel Casse, *The Public Interest*, 10 East 53 Street, New York, N.Y. 10022. 7. Owner: National Affairs, Inc. (non-profit), 10 East 53 Street, New York, N.Y. 10022. 8. Known bondholders, mortgagees and other security holders owning or holding 1 percent or more of total bonds, mortgages or other securities: None. 9. The purpose, function, and non-profit status of this organization and the exempt status for federal income tax purposes have not changed during the preceding 12 months.

10. Extent and nature of circulation:	*Average no. copies each issue during preceding 12 months*	*Actual no. copies of single issue published nearest to filing date*
A. Total no. copies:	11,596	11,215
B. Paid circulation:		
1. Sales through dealers and carriers:	796	750
2. Mail subscriptions:	7,399	7,291
C. Total paid circulation:	8,195	8,041
D. Free distribution:	390	386
E. Total distribution:	8,585	8,427
F. Copies not distributed:		
1. Office use, left over, etc.	2,536	2,338
2. Returns from news agents:	475	450
G. Total:	11,596	11,215

11. I certify that the statements made by me above are correct and complete: Daniel Casse, Managing Editor.

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"Matters of color" —blacks and the constitutional order

GLENN C. LOURY

IN HIS TREATISE on the early development of American legal doctrine affecting slaves, U.S. Circuit Court Judge Leon Higginbotham observes: "This new nation, 'conceived in liberty and dedicated to the proposition that all men are created equal,' began its experiment in self-government with a legacy of more than one-half million enslaved blacks—persons denied citizenship and enslaved, not for criminal infractions, but solely as a matter of color." The United States, in other words, was born with the burden of a sinful, "peculiar" institution which belied the very ideals the Founders sought to affirm. That a group of colonialists, proclaiming themselves fathers of a new nation built on Jefferson's "self-evident truths," were prepared to legitimate in law the brutalities requisite to a commerce in human beings is an irony that forms the heart of a powerful indictment of the American legal tradition by Judge Higginbotham. He goes on to cite a conversation with Earl Warren shortly before the Chief Justice's death, in which the two jurists agreed that "there is a powerful nexus between the brutal centuries of colonial slavery and the racial polarization and anxieties of today. The poisonous legacy of legalized oppression based upon the matter of color can never be adequately purged from our society if we act as if slave laws had never existed."

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Slavery's "poisonous legacy"

But no matter what our actions, can this "poisonous legacy" ever be purged from our civic life? Is the Constitution an aid or an obstacle to the removal of this legacy? Are the precepts and structures of American government capable of eradicating the consequences of the "original sin" which was African slavery? This is an old question, raised 150 years ago by Tocqueville, who wrote: "The most formidable of all the ills that threaten the future of the Union arises from the presence of a black population upon its territory." This astute observer of early American life further noted that the difficulty was more than a legal one, that "the prejudice which repels the Negroes seems to increase in proportion to their emancipation . . . and inequality is sanctioned by the manners while it is effaced from the laws of the country."

Moreover, this question remained unanswered a century after the publication of *Democracy in America*, when Gunnar Myrdal defined the "American Dilemma" as "the ever-raging conflict between, on the one hand, the valuations preserved on the general plane which we shall call the 'American Creed,' where the American thinks, talks and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook." Myrdal envisioned a fundamental conflict between the civic creed embraced in principle by Americans, and codified in the Constitution and Declaration of Independence, on the one hand, and the social norms and practices which governed the ways in which concrete social intercourse occurred among various groups of Americans, on the other. Neutralization of the legacy of slavery would require, in his view, a bridging of this gap between ideals and customs.

Nor has this question regarding the permanency of that "poisonous legacy" yet been settled, despite the remarkable revolution in our law and politics on the matter of color that has occurred in the last generation. For the considerable merits of this long-overdue reconstruction of the legal status of blacks notwithstanding, a cursory inspection of our contemporary political discourse on "matters of color" would reveal that, for many, it has not been sufficient to vindicate the liberating potential of the American constitutional tradition. Too many black and white Americans—dissatisfied with

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our slow progress toward racial economic equality, disillusioned with the limited efficacy of public policies (like court-ordered busing for school desegregation) in which they had placed so much hope, disoriented by the now nearly wholesale rejection by blacks of the classical integregation ideal, dismayed by the depressing nature of social life among the black underclass—have concluded that it is this tradition itself that has, in view of these developments, been shown to be inadequate.

One indication of this state of affairs is the remarkable argument of political scientist Jennifer Hochschild's recent book on school desegregation, *A New American Dilemma*. There she holds that the unwillingness of the American courts to go any further than they did to override popular, democratically expressed opposition to massive, cross-district busing is a measure of our nation's limited commitment to the ideal of equal opportunity. The "new" dilemma that she has discovered is that, given the interests and concerns of whites, democracy is inconsistent with racial equality of opportunity because the former too severely constrains those state actions essential for the attainment of the latter.

This is a far more pessimistic vision than that of Myrdal, though offered at a time when most of Myrdal's concerns had been legally addressed, and when attitude surveys revealed a significant increase in racial tolerance among whites over the past generation. Hochschild argues that a genuine commitment to equal opportunity would require a willingness to carry on color-conscious pupil assignments regardless of the ambiguity of the evidence as to the beneficial educational effects of such actions, or the extent or intensity of popular opposition to such policy—or even whether that opposition comes from blacks instead of whites! In her view, the "poisonous legacy" of slavery shall be indefinitely perpetuated precisely because our system of government accords too much respect to the "will of the people."

Promise and performance

The not-so-quiet desperation in Hochschild's argument is mirrored in the public pronouncements of civil rights advocates around this country, where the recalcitrant persistence of racial inequality of results under conditions of ostensible equality of opportunity is attributed to the half-hearted or incomplete application of some constitutional mandate. When the last police sergeant's examination was administered in New York City, using an exam that was explicitly prepared (at a cost of five hundred thousand dollars, under

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a court-supervised consent decree) so as to test only job-relevant skills (in keeping with the Supreme Court's interpretation, in its famous Griggs decision, of the requirements of the Civil Rights Act of 1964), the disappointing result was that 10.1 percent of the white officers and 1.7 percent of the black officers passed the exam. Immediately a lawsuit was filed to prevent promotions based on the exam results, with representatives of the black officers admitting that it was not the *test*, but the *results* of the test that were "unfair." In due course, the city chose to employ a racial quota instead of strictly following the results of the exam. But the matter will not end there; white officers have filed countersuits, and the city has now been forced to make inquiries into the genealogical backgrounds of officers claiming minority status so as to avail themselves of the benefits of the quota. Despite well-intentioned efforts, the "poisonous legacy" continues to assert itself.

The deep problem posed by persistent racial differences in educational performance, for those who placed their hopes for the attainment of equal educational opportunity on desegregating public schools, is illustrated by the attack on public high schools for the gifted now being waged by some advocates in New York City. More than three decades after the *Brown* decision, confronted with the depressingly small numbers of black students qualifying for placement at these academically elite institutions, the best these advocates can do is condemn the use of public resources to foster the development of New York City's most talented youngsters. Writing in the *New York Times*, former NAACP official Michael Meyers argued: "The specialized high schools for the 'gifted' should be phased out," for "the mere existence of such schools exacerbates the problem of a racially segregated educational system by serving as havens for many whites. . . ." These schools, he insists, "institutionalize educational racial tracking under the guise of catering to educational elitism." His remedy: Close the Bronx High School of Science and like institutions because the low representation of blacks violates the constitutional prohibition against "separate but equal" educational facilities.

But the prohibition against "separate but equal" facilities is irrelevant to the problem at hand, and this argument places far too much weight on constitutional considerations to resolve difficulties that are of social and economic origin. There is every reason to believe that where black parents are intimately involved in their child's education, where adolescent peers accord as much respect to academic as to athletic excellence, and, yes, where teachers hold high expectations for the performance of all their students, black

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youngsters can attain the highest academic rewards. But how, we must ask Mr. Meyers, are any of these things to be had by closing the Bronx High School of Science? And, who but the poor (who, even when white, deserve our concern) will pay the price for such folly? In view of the fact that (even in New York City) demands such as this are destined to fall on deaf ears, Mr. Meyers, like Professor Hochschild, is left with no recourse other than to decry our nation's limited commitment to the constitutional principles that he mistakenly invokes.

This pessimism among influential advocates for blacks' rights about the ability of the American civic tradition to accommodate the eradication of slavery's legacy is further illustrated by events surrounding the first national celebration of Martin Luther King, Jr., Day. The Rev. Jesse Jackson could then be heard decrying the focus on King's 1963 "I Have A Dream" speech, and belittling King's powerful metaphor—his "dream" that America might yet come to live by the great principles it espoused. Said Jackson: "That so-called 'I have a dream speech' . . . was not a speech about dreamers and dreaming. It was a speech describing nightmare conditions. . . . Dr. King was not assassinated for dreaming." Why, then, was the "dreamer" killed? This is Jackson's "explanation" of the tragedy, as reported in the *Washington Post* during the 1984 presidential campaign:

> He [Jackson] . . . repeated his belief that the Federal Government had taken part in a conspiracy to murder Dr. King. "I went to see James Earl Ray in prison. . . . It was clear he was involved, but it was also clear he wasn't capable of pulling it off himself." The candidate said that the authorities had failed to protect the minister . . . [adding that] the Federal Bureau of Investigation had attempted to impugn his character and divide his family. The F.B.I. saw as its role to disrupt, discredit or destroy a "black messiah," he said. "Given the fact that the CIA will mine harbors and overthrow governments, if they perceived an individual as having the power to offset a war machine, it stands to reason he would be in extreme jeopardy by a mean government," Mr. Jackson concluded.

Such is the "poisonous legacy" of slavery, still alive in our contemporary politics.

Blacks and the Founders' vision

It is worth noting that, until quite recently, the black champions of the struggle for equal citizenship have placed great faith in the capacity of the Constitution to deliver on its promise. Abolitionist Frederick Douglass, for example, parted company with his mentor William Lloyd Garrison over this issue. Garrison and his followers saw the Constitution as a proslavery document, "a covenant with death," and thought it immoral to vote or to engage in any

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political activity under this fundamentally unjust framework. Douglass, on the other hand, held "that the Federal Government was never, in its essence, anything but an anti-slavery government. Abolish slavery tomorrow, and not a sentence or syllable of the Constitution need be altered. . . . If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed." Clearly the decades-long effort of Charles Houston and William Hastie, architects of the NAACP's legal assault on segregation, which culminated with that great victory that was the Supreme Court's 1954 *Brown* decision, was sustained by an abiding faith in the coherence of the Founders' vision. And Martin Luther King, Jr., while leading a mass movement to eradicate Jim Crow in the South, spoke eloquently and often of "that magnificent promissory note," which was the as yet unfulfilled obligation to blacks implicit in the American civic creed.

But has not *that* obligation now been fulfilled? Do not the Civil Rights Acts of the 1960s, the Supreme Court decisions running from *Brown* through *Bakke*, the most recent cases upholding affirmative action, the political failure of those in the Reagan administration to change the direction of the country on civil rights issues, the near-universal affirmation of the inadmissibility of racial prejudice in public political discourse, the broad acceptance throughout the private sector of the legitimacy and necessity of exerting special efforts to include "previously excluded groups" when making employment or educational admissions decisions, even the historic campaign for the presidency of Jesse Jackson himself—do not all of these things, and many more which could be mentioned, confirm that Martin Luther King, Jr., did not "dream" in vain?

Is it not therefore ironic indeed, as the bicentennial of the U.S. Constitution approaches, with the faithful visions of Douglass, Houston, King, and countless others vindicated by the successes of the civil rights movement, that there should be so many questions raised about the ability of the American constitutional order to accommodate an equal citizenship for blacks? For although there can be little question that, on the whole, black Americans have not as yet attained full equality—in economic, social, or political standing—within our society, it is hard to see how the principles of government codified in the Constitution, as now being interpreted and administered throughout the land, can be faulted for this incomplete success. But, if this is so, how can we ever expect to be finally free of the enormous burden arising out of the "original sin" that was black slavery?

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Emancipation is not enough

We will never escape the specter of the "original sin" of slavery until we understand that the liberalization of the legal framework —the fulfillment of the promise of equal rights implied in the Founding Fathers' vision of American government—is a necessary, but not sufficient condition for the attainment of equal citizenship for the descendants of the slaves. As Tocqueville and Myrdal both saw clearly, and as the problem of "white flight"—which has plagued public schools and, to a lesser extent, residential desegregation efforts—further attests, the inequality of condition that black Americans endure is rooted in *social* as much as in *legal* practice. And the ability of the law to undo what the racially discriminatory associational behaviors of white and black Americans have wrought is extremely limited.

We are, of course, intimately familiar with these socially discriminatory behaviors because we all engage in them daily. We choose our friends and neighbors, decide upon our business partners and professional associates, select the schools our children will attend, influence (to the extent we can) the prospective mates of our children, and, of course, choose our own mates. Moreover, for the great majority of us—black and white—race, ethnicity, and religion are factors in these discriminating judgments. The statistics on interracial marriages show this to be so, as does the extent of social segregation in the ostensibly integrated environments of today's colleges and universities. The preservation of our distinct ethnic communities, once thought to be a parochial, even reactionary, objective has, in the wake of the "black power movement," the "rise of the unmeltable ethnics," and the advent of bilingualism, become the respectable (and occasionally government-mandated) pursuit of "pluralism."

While all but the old-style integrationists now celebrate the embrace of diversity implied by this new pluralism, advocates of equality are not always happy with its consequences. For, as a number of writers have observed, there is an inevitable tension between the ideal of equality of opportunity for individuals, and the fact of pluralistic social organization along group lines.[1] The fact is that such social clustering has important economic consequences. There

[1] Nathan Glazer foresaw this conflict, with its powerful implications for the equalitarian aspirations of blacks, *before* the separatist sentiments associated with the black power thrust came to the fore. See his "Negroes and Jews: The New Challenge to Pluralism," *Commentary*, December 1964. The philosophical implications of this tension between communal ties and the ideal of equal opportunity are nicely developed by James Fishkin in *Justice, Equal Opportunity, and the Family* (New Haven: Yale University Press, 1983).

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is an extensive literature in economics and sociology which documents the importance of family and community background as factors influencing a child's later life success. There is also good reason to think that the attitudes and values communicated to youngsters via the cultural milieu of their particular communities of origin —attitudes about work, family, and education—serve to promote group differences in economic attainment in adulthood. And these factors operate not only between the races, but within racial groups as well. A number of analysts of the black underclass have come recently to stress the debilitating consequences of the social isolation of inner-city communities—isolation from whites, and from those black families that, in the post-1960s era of declining housing discrimination, have availed themselves of the opportunity to move out of traditionally black residential areas.[2]

It is crucial to realize that what is involved here is in the main not a legal, or even an attitudinal problem, but an inescapable social fact. If people are left with the liberty to choose their social environments, then their exercise of that liberty will inevitably produce a situation in which only mutually advantageous associations can be sustained. As a result, some persons will be deprived of the benefits of an association that, while desirable from their point of view, is perceived as undesirable from the point of view of the other. When the association at issue is that between an employer and an employee, the antidiscrimination mandate of the Civil Rights Acts of 1964 requires that race play no part in the calculation of mutual advantage. But when the association is that between two prospective neighbors, mates, business associates or friends, no such statutory restraints apply.

Our legal and philosophical traditions are such that we are unwilling to undertake the degree of intrusion into the intimate associational choices of individuals that would be required to achieve a full equality of opportunity between individuals or the members of various ethnic groups. Such choices, in our law and in our ethics, lie beyond the reach of the antidiscrimination mandate. They are private matters that, though susceptible to influence and moral suasion about the tolerance of diversity and the like, are not thought to constitute the proper subject of judicial or legislative decree. Freedom to act on the prejudices and discriminations that induce each of us to seek our identities with and to make our lives among a specific, restricted set of our fellows, is among those inalienable rights

[2] Perhaps the most prominent exponent of this thesis is University of Chicago sociologist William Julius Wilson. See his *The Truly Disadvantaged: Essays on Inner City Woes and Public Policy* (Chicago: University of Chicago Press, forthcoming, 1987).

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to life, liberty, and the pursuit of happiness enshrined in the Declaration of Independence.

Nor, on the experience of the past decade and a half of affirmative action, can the use (within reasonable and constitutional bounds) of preferential treatment hope to offset the effects on individual achievement of racially differential access to those social affiliations that have the greatest impact on subsequent economic success. While we seek to maintain integration through race-conscious allocation of public housing units, it is clear that such practice cannot prevent disgruntled residents from moving away when the racial composition of their neighborhood changes contrary to their liking. And while racial school assignments may be needed, it is also clear that busing for desegregation cannot prevent unhappy parents (those who can afford it!) from sending their children to private schools, or moving to another, more ethnically homogenous district.[3] How intrusive we choose to be in restricting such responses is both a political and a constitutional question, though it seems clear that elimination altogether of this kind of discrimination would be neither feasible nor desirable in a free society.

We will therefore have to live with some of the consequences of it. As a practical matter this means that we will have to accept that some of the inequality results from the fact that even the best Head Start program is an expensive and imperfect substitute for the advantages freely conveyed to a youngster born to middle-class, well-educated, attentive, and concerned parents. And we shall have to live with the fact that some subgroups inculcate attitudes and values that leave their youngsters better prepared, and more inclined, than others to pursue careers as university professors, entrepreneurs, or engineers. This is certainly not to say that one should avoid any effort to stimulate interest in these areas among those who may need such stimulation, or that it is futile to try, through social programs of various kinds, to compensate for disadvantaged backgrounds. My argument is that, having undertaken such stimulative and compensatory efforts to the extent deemed prudent, we should not be surprised if they fall short of achieving the equalitarian result which motivated them. Nor need we infer from the continued existence of

[3] The Supreme Court's decision in the Detroit cross-district busing case, *Milliken* v. *Bradley*, limiting the use of metropolitan busing to solve the "white flight" problem, gives a classic illustration of this point. For, while it may be argued that the nearly totally black public school system in Detroit is handicapped severely in its ability to prepare its students for competition with suburban whites, the Court decided that without evidence of suburban district complicity in the segregation of city schools, whites who chose to avoid the city's school system by moving to the suburbs could not be forced to lend their children to the project of integration.

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inequality in the face of such efforts that we have failed to attain a political and legal order consistent with our highest ideals. For among those ideals is a respect for that very individual autonomy in the sphere of personal associations which makes some disparity in the advantages of social background, and thus in subsequent economic results, inevitable.

Autonomy and equality

One aspect of the "poisonous legacy" of slavery and the subsequent denial of equal rights has been that blacks are disproportionately represented among those whose "social background resources" are comparatively deficient. In view of this history of racial oppression under which we as a political community labor, the ongoing fact of group disparity is bound to be attributed by those advocating the interests of the dispossessed to a failure to make good on the promise of the American civic creed. Our slavery-laden past will naturally be evoked as cause of our unequal present. And the failure of special actions on behalf of blacks, legitimated by reference to the constitutional requirement of "equal protection," to bring about an equality of status in the present may well be seen as evidence that the process of emancipation remains incomplete.

Yet the existence of racial disparity in contemporary economic circumstances is not, *ipso facto*, evidence that we have failed to achieve equality before the law for the descendants of slaves. Those who look to the Constitution to provide a remedy for group inequality, which originates in historic discrimination but is perpetuated through social organization, are doomed to be disappointed, and sometimes bitterly so. When opportunity for success in life is linked to parental and communal circumstances, and when individuals employ racial criteria among others in their decisions about private associations, group inequality can go on for a long time, notwithstanding the fact that the original source of the disparity, remediable through the law, has long since been addressed. Complete emancipation, in the sense of the attainment of the full legal rights and privileges associated with citizenship, does not imply an equality of standing in the social and economic order.

Unfortunately this point is not sufficiently well understood or accepted by contemporary advocates of racial equality. They continue to seek a constitutionally secured "freedom and equality" for blacks, as if these goals could be ordained by a government endowed with sufficient nobility of spirit and clarity of purpose. There is something tenuous, and ultimately pathetic, about the position of

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blacks in this regard. Do not recoil here at the use of the word "pathetic"; that, after all, is what this practice is all about—evoking the pity, and the guilt, of whites. But, for that very reason, the practice is inconsistent with the goal of freedom and equality for blacks. One cannot be the equal of those whose pity, or guilt, one actively seeks.

Booker T. Washington, that much maligned figure who rose to prominence as a black leader and spokesman some ninety years ago, understood this matter clearly. "It is a mistake," Washington wrote, "to assume that the Negro, who had been a slave for two hundred and fifty years, gained his freedom by the signing, on a certain date, of a certain paper by the President of the United States. It is a mistake to assume that one man can, in any true sense, give freedom to another. Freedom, in the larger and higher sense, every man must gain for himself."

How long can blacks continue to evoke the "slavery was terrible, and it was your fault" rhetoric and still suppose that dignity and equality can be achieved thereby? Is it not fantastic to suppose that the oppressor, whom strident racial advocates take such joy in denouncing, would, in the interest of decency and upon hearing the extent of his crimes, decide to grant the claimants their every demand? The evocation of slavery in our contemporary discourse has little to do with sociology, or with historical causation. Its main effect is moral. It uses the slave experience in order to establish culpability. Why should others—the vast majority of whom have ancestors who arrived here after the emancipation, or who fought against the institution of slavery, or who endured profound discriminations of their own—permit themselves to be morally blackmailed with such rhetoric? How long can the failures of the present among black Americans be excused and explained by reference to the wrongs of the past? Must not, after some point, there begin to be resentment, contempt, and disdain for a group of people that sees itself in such terms? Consider the contradictions: Blacks seek general recognition of their accomplishments in the past, and yet must insist upon the extent to which their ancestors were reduced to helplessness. Blacks must emphasize that they live in a nation which has never respected their humanity, yet expect that by so doing, their fellow countrymen will be moved to come to their assistance.

Self-emancipation

Though the signs of intellectual exhaustion in this line of advocacy are evident, it continues to be embraced because of the way in

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which blacks' claims have been most successfully pressed over the past generation. These claims are based, above all else, on the status of blacks as America's historical victims. Maintenance of this declared status requires constant emphasis on the wrongs of the past and exaggeration of present tribulations. He who leads a group of historical victims, as victims, must never let "them" forget what "they" have done; he must renew the indictment and keep alive the moral asymmetry implicit in the respective positions of victim and victimizer. He is the preeminent architect of what Kenneth Minogue has called "suffering situations." The circumstance of his group as "underdog" becomes his most valuable political asset.

But such a posture in the political arena can inhibit the attainment of genuine freedom and equality, for it militates against an emphasis on personal responsibility within the group, inducing those group members who have been successful to attribute their accomplishments to fortuitous circumstance, not to their own abilities and character, and encouraging those who fail to see their failure as the inevitable consequence of historic wrongs. It is difficult to overemphasize the self-defeating dynamic at work here. The dictates of political advocacy require that personal inadequacies among blacks be attributed to the "system," and that emphasis by black leaders on self-improvement be denounced as irrelevant, self-serving, dishonest. Individual black men and women simply cannot fail on their own, they must be seen as never having had a chance. But where failure at the personal level is impossible, there can also be no personal success. For a black to embrace the Horatio Alger myth, to assert as a guide to *personal* action that "there is opportunity in America," becomes a *politically* repugnant act. Each would-be black Horatio Alger indicts as inadequate or incomplete the deeply entrenched (and quite useful) notion that individual effort can never overcome the "poisonous legacy" of slavery.

Yet where there can be no black Horatio Algers to celebrate, sustaining an ethos of responsibility that might extract maximal effort from the individual in the face of hardship—that is, that might facilitate his true emancipation—becomes impossible as well. A graphic illustration of this theme is John Edgar Wideman's poignant and brilliantly written account of two brothers, one who is serving a life sentence for murder in a Pennsylvania penitentiary, and the other who is the author. In *Brothers and Keepers*, Wideman, a Rhodes scholar and a highly acclaimed novelist and college professor, can find only societal and circumstantial explanations for the difference in outcomes between himself and his brother, assiduously avoiding

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the possibility that distinctions of character and values might somehow be involved. It is not his brother, but "society" that has failed. In a central passage in the book, after describing the death of Garth, his brother's close friend who had received inadequate care at a public health clinic, Wideman relates his mother's (and, evidently, his own) view of the matter:

> Mom expects the worst now. She peeped their [the system's] hole card. She understands they have a master plan that leaves little to accident, that most of the ugliest things happening to black people are not accidental but the predictable results of the workings of the plan. What she learned about authority, about law and order didn't make sense at first. It went against her instincts, what she wanted to believe. . . . Garth's death and [brother] Robby's troubles were at the center of her new vision. Like a prism, they caught the light, transformed it so she could trace the seemingly random inconveniences and impositions coloring her life to their source in a master plan.

Notice the alternatives: Outcomes are either accidents (possibly fortuitous, as in his own case) or the result of a "master plan" against blacks, but never the consequence of individual, willfull acts. Indeed, he seems at one point to be arguing that it was his brother's courage and strength to rebel against the rules laid down by racist whites —rules which he dutifully followed while harboring a resentment and rage barely concealed beneath a veneer of refinement and civility—that accounts for their different circumstances. He offers, in his brother's voice, the following "explanation" of the behavior of "young black men in the streetworld life":

> So this hip guy, this gangster or player or whatever label you give these brothers we like to shun because of the poison that they spread, we, black people, still look at them with some sense of pride and admiration, our children openly, as adults somewhere deep inside. We know they represent rebellion—what little is left in us. Well, having lived in the "life," it becomes very hard—almost impossible—to find any contentment in joining the status quo. Too hard to go back to being nobody in a world that hates you.

The work is suffused with the guilt of the survivor—the agonizing dilemma of those who, having escaped catastrophe intact, are forever plagued with the unanswerable question: "Why was I spared, and not the others?" Wideman's answer, which seems to be "I was just lucky," is belied by the very account he provides. That he manages to effect this moral sleight of hand without fundamentally undermining the literary integrity of his book is testimony to his skill and power as a writer. His evocation of the humiliating plight of those trapped in "the cage" of prison, subject to the near unlimited powers of their "keepers," is simply unforgettable. Yet, though

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there is little now to be done about the tragedy of brother Robby, consider the message that his book sends to young black men in similar circumstances throughout the country, who might yet avoid his brother's plight: "Your life is not your own to build as you will; they've got 'a master plan.' You can submit, and be 'a nobody in a world that hates you,' or have the courage to rebel, and die in a cage." This seductive intellectual nihilism, inspired by an understandable agony of grief for those lost to the ravaging legacy of racism, throws away the infinite possibilities of the many who, with sustained effort inspired by their loved ones' highest expectations, might yet overcome that legacy.

The price extracted

James Baldwin spoke to this problem with great insight long ago (so long, in fact, that he seems to have forgotten his own advice). In his 1949 essay "Everybody's Protest Novel," Baldwin said of the protagonist of Richard Wright's celebrated novel *Native Son*:

> Bigger Thomas stands on a Chicago street corner watching airplanes flown by white men racing against the sun and "Goddamn" he says, the bitterness bubbling up like blood, remembering a million indignities, the terrible, rat-infested house, the humiliation of home-relief, the intense, aimless, ugly bickering, hating it; hatred smoulders through these pages like sulphur fire. All of Bigger's life is controlled, defined by his hatred and his fear. And later, his fear drives him to murder and his hatred to rape; he dies, having come, through this violence, and we are told, for the first time, to a kind of life, having for the first time redeemed his manhood.

But Baldwin rejected this "redemption through rebellion" thesis as untrue to life and unworthy of art. "Bigger's tragedy," he concluded,

> is not that he is cold or black or hungry, not even that he is American, black; but that *he has accepted a theology that denies him life, that he admits the possibility of his being sub-human and feels constrained, therefore, to battle for his humanity according to those brutal criteria bequeathed him at his birth.* But our humanity is our burden, our life; we need not battle for it; we need only to do what is infinitely more difficult —that is, accept it. The failure of the protest novel lies in its rejection of life, the human being, the denial of his beauty, dread, power, in its insistence that it is his categorization alone which is real and which cannot be transcended (emphasis added).

Baldwin's interest was essentially literary, mine is sociopolitical. In either case, however, the struggle is against the deadening effect which emanates from the belief that, for the black man, "it is his categorization alone which is real and cannot be transcended." The spheres of politics and of culture intersect in this understanding of what the existence of systemic constraint implies for the possibilities

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of individual personality. For too many blacks, dedication to the cause of reform has been allowed to supplant the demand for individual accountability; race, and the historic crimes associated with it, has become the single lens through which to view social experience; the infinite potential of real human beings has been surrendered on the alter of protest. In this way does the prophecy of failure, evoked by those who take the fact of racism as barring forever blacks' access to the rich possibilities of American life, fulfill itself: Emphasis on the determinative effects of the "poisonous legacy" in the struggle to secure redress for past oppression requires the sacrifice of a primary instrument through which genuine freedom might yet be attained.

Thus does the decision to play the historical victim extract its price. The acknowledgment by blacks of the possibility, within the American constitutional order, of individual success, and the recognition of the personal traits associated with such success, comes to be seen, quite literally, as a betrayal of the black poor: For it undermines the legitimacy of what has proven to be their most valuable, if too often abused and rapidly depreciating, political asset. There is, hidden in this desperate assertion of victim status by blacks to an increasingly skeptical white polity, an unfolding tragedy of profound proportion. Black leaders, confronting their people's need and their own impotency, believe they must continue to portray blacks as "the conscience of the nation." Yet the price extracted for playing this role, in incompletely fulfilled lives and unrealized personal potential, amounts to a "loss of our own souls." As consumate victims, blacks lay themselves at the feet of their fellows, exhibiting their own lack of achievement as evidence of their countrymen's failure, hoping to wring from the American conscience what we must assume, by the very logic of their claim, lies beyond the ability of individual blacks to attain, all the while bemoaning how limited that sense of conscience seems to be. This way lies not the "freedom" so long sought by our ancestors but, instead, a continuing serfdom.

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Disestablished religion in America

JEREMY RABKIN

THE UNITED STATES continues to operate under the oldest written constitution still in force in the world today—as we are likely to be reminded all too often in this season of the Constitution's bicentennial. At the same time, the United States remains the most religious country in the Western world—to judge, at least, by what people tell pollsters about their religious beliefs and practices. According to Gallup surveys, 95 percent of the American people profess belief in God, some 70 percent claim that they pray, and an equal proportion claim affiliation with a particular church or synagogue.[1] Since the early nineteenth century, foreign visitors have been equally struck by America's unusual stability and its unusually pervasive public piety. The connection between them inevitably prompts reflection.

One connection has been stressed by public men in America from the outset. The constraints inculcated by religion may help people to

[1] Other surveys tells us that 86 percent of Americans say that their "religious beliefs" are "very important" or "fairly important," while in Britain and Sweden, where national churches are established by law, the comparable figures are 49 percent and 35 percent; in West Germany, where a party calling itself "Christian" has dominated government for most of the past four decades, the comparable figure is 47 percent. But even the Gallup surveys suggest that American faith is often rather lax and unformed: Where 77 percent of Americans claim to believe in "the full authority of the Bible," for example, only 42 percent can name the four gospels or identify the author of the Sermon on the Mount.

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develop the self-restraint required by a constitutional democracy. "Our Constitution was designed for a religious and moral people and for no other" was how John Adams put it. But such formulations, gratifying as they may be to the American self-image, tend to obscure an important fact about "religion": Not every kind of religion is compatible with a liberal constitutional order. The stability of our constitutional order owes much to the fact that the dominant religious tendencies through most of American history have, in fact, been quite compatible with liberal democracy and religious tolerance and have not, by and large, forced people to make wrenching choices between religious and civil obligations.

The connection no doubt has also worked in the opposite direction, however. The disestablishment of religion in our constitutional order has encouraged an extraordinary proliferation of religious sects and religious doctrines that has made sectarian repression seem impractical, even for those who did not regard it as improper. At the same time, religious diversity has encouraged a general blurring of the boundaries of "religion" and a weakening of church discipline, so that people of quite different character and outlook can all regard themselves as "religious in my own way." Perhaps most important, the condition of churches in our constitutional order—neither persecuted nor supported by government, and therefore neither goaded to a reactive rigor nor lulled into a complacent repose—has forced them to remain open to wider cultural trends in order to recruit or retain adherents and sympathizers. Disestablished religion has had to be more democratic religion, at least in the sense of being more attentive to the views and preferences of adherents. And while this has no doubt been a source of strength, it has often been a threat to religious integrity as well.

If this means that contemporary religion in America is in many ways not what it used to be, neither, of course, is the Constitution. The federal government has assumed a vast array of regulatory and social welfare responsibilities that would have seemed unthinkable under older understandings of the Constitution. And the federal courts have assumed an extraordinary role in monitoring the activities of state and local governments to ensure their conformity with current national ideals. The Constitution, like "religion," has endured in part because it has proved more elastic than anyone expected in earlier times. And although it may be impossible to disentangle historical cause and effect in these changes, there is surely more than mere parallelism in this.

For all of America's religious diversity, the dominant religious presence has been Protestant and the most reformed kind of Protes-

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tantism, which disdains ritual and liturgy and places an unusually heavy emphasis on morality. As S.M. Lipset, Samuel Huntington, and other interpreters of American politics have emphasized in recent years, the moralistic stridency that has characterized many of the historic disputes in American constitutional history may be traced back to the outlook encouraged by the dominant Protestant sects in America—though this moralism, having entered the broader political culture, has been readily adopted by many Catholics and Jews in this century. This has as often strained the Constitution as steadied it by investing it with uncompromising moral imperatives. But it has certainly preserved the Constitution as a focal point or touchstone of political dispute and rival political creeds.

The challenge of disestablished religion

The American Founding might be described as gesturing to religious sentiment and then resolutely looking away. American independence was justified with a theological assertion declared to be a self-evident truth. Whatever else it may mean, the claim in the Declaration of Independence that men are "endowed by their Creator" with certain "unalienable rights" is an assertion that only certain forms of government are consistent with God's intention or with the human nature He created.

The claim that government is instituted to "secure rights"—and not to save souls—had indeed been earnestly argued by Protestant dissidents during the English Civil War more than a century before. By the eighteenth century, Enlightenment versions of these arguments had come to be widely accepted among Protestant ministers in America because most of the colonial churches, upholding what were "dissenting" creeds in England, had gone through similar struggles to defend the rights of "conscience" against any imposed conformity with the Church of England. The American Revolution was widely supported by the clergy of colonial America, who preached on its behalf in terms not much removed from the rhetoric of other patriot leaders. After surveying the published sermons of patriot ministers of that era, Clinton Rossiter concluded that "had ministers been the only spokesmen of the rebellion, had Jefferson, the Adamses, and Otis never appeared in print, the political thought of the Revolution would have followed almost exactly the same line —with perhaps a little more mention of God, but certainly no less of John Locke."

But the Constitution itself does not mention God. It does not even mention religion except to prohibit religious tests for office.

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And when the First Amendment was added to the Constitution, it seemed to underscore this fastidious refusal to claim religious sanction for the federal charter by linking its guarantee of the "free exercise of religion" with a prohibition on all laws "respecting an establishment of religion." The language of this amendment reflected a compromise among men with rather different views on state-church relations; since it was addressed only to Congress, it left the states free to adopt their own approaches in this area. Still, it is certain that at least James Madison, a leading figure in the drafting of both the Constitution and the Bill of Rights, championed a severe and constraining view of the proper relations between church and state.

Two years before the Constitutional Convention met in Philadelphia, Madison waged a successful campaign in Virginia against a proposed tax assessment for "the support of teachers of the Christian religion." Madison (like his close ally in this political campaign, Thomas Jefferson) was not at all mollified by the fact that this proposal would have allowed each taxpayer to direct his assessment to his preferred denomination and would have allowed non-Christians to direct their assessments to secular "seminaries of learning." Madison's "Memorial and Remonstrance" against the proposal insisted in uncompromising terms that "the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him . . . is precedent, both in time and in degree of obligation, to the claims of Civil Society"; "religion" must therefore remain "wholly exempt from its cognizance."

This argument was successful in Virginia, as later in other states, because it was strongly supported by Baptists and other peripheral sects who were intensely suspicious of any government involvement with their affairs. It was an argument that many other American churches found hard to oppose, having urged rather individualistic conceptions of "conscience" in their own struggles against the Church of England. But disestablishment, even on the narrow issue of direct funding of churches, was hardly a necessary conclusion from the claim to religious liberty. Several European countries to this day provide public funding for churches without arousing any great outcry about religious persecution. And the view that it is dangerous for government to treat religion like a mere private commodity, to be bought or sold according to individual taste, was embraced by men no less committed to limited government than Madison and not at all pious.

This was, for example, the argument of the skeptical philosopher David Hume, whose thought in other respects was much admired by many of the American Founders. Hume agreed with his friend

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Adam Smith that the development of most "arts and professions" could be safely left to the profit motive of their practitioners, but still insisted that "this interested diligence of the clergy is what every wise legislator will study to prevent." Otherwise, "customers will be drawn to each conventicle by new industry . . . in practising on the passions and credulity of the populace. . . . Each ghostly practitioner . . . will inspire them with the most violent abhorrence of all other sects and continually endeavor, by some novelty, to excite the languid devotion of his audience." At the least, Hume therefore concluded, "the most decent and advantageous" arrangement for "the spiritual guides" must include some measure "to tribe their indolence, by assigning stated [government] salaries to their profession and rendering it superfluous for them to be farther active. . . ."

From this perspective, Madison's insistence on an absolute separation between church and state implied a remarkable degree of trust in the churches. He was confident that, left to themselves, most churches, in their teachings and in their ambitions, would pose no significant threat to republican government. In part, this was because he assumed that the "multiplicity of sects which pervades America" would, like the multiplicity of political "factions" in general, operate as a check on sectarian ambition. He also assumed that the principles of limited government were simple enough to be readily defended. He did not hesitate to affirm that "the end of government" is simply "to protect property of every sort" and to hold that "that alone is a just government which impartially secures to every man whatever is his own." Madison did not object to moral regulation in the interest of order, but he seems to have assumed that this would be separated from religion or at least from religious controversy. The curious truth about American history is that it has largely confirmed Madison's confidence in unsupported and unfettered churches—while belying all the assumptions on which he grounded this confidence.

Bourgeois piety and bourgeois morals

Withdrawal of public financial support for churches in the decades after the American Revolution was accompanied—and no doubt facilitated—by a general decline in private involvement with churches and an apparent decline in the intensity of private belief. Jefferson predicted that the majority of Americans would become Deists or Unitarians in his own lifetime. But within two generations the religious atmosphere had changed dramatically. By the 1830s,

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when Tocqueville visited America, he found it "the place where the Christian religion has kept the greatest real power over men's souls."

The religious revival was caused or at least led by intense and continuous proselytizing efforts of evangelical churches—and almost all the major Protestant churches considered themselves evangelical in the nineteenth century—and these evangelicals were inspired by the vision of making America a truly "Christian country." This was by no means simply an expression of nostalgia for the era of formal establishment. The denominations that were most successful in evangelizing the western frontier regions in the nineteenth century, most notably the Methodists and Baptists, had been fringe sects at the time of the Revolution, and their highly emotional revival meetings came to be viewed with considerable misgivings by the previously established Congregational and Presbyterian churches of New England. But cooperation among evangelical denominations, both in missionary activities and in politics, proved to be much more extensive than men like Madison had expected. As Sidney Mead has written, the nation, in evangelical thought, "emerged as the primary agent of God's meaningful activity in history" and assumed "a churchly function in becoming the community of righteousness."

Still, what made the call for a "Christian America" powerful in the nineteenth century was that it did not present itself, and doubtless did not conceive itself, as a challenge to the existing constitutional order. Most evangelical clergymen praised popular government and even the separation of church and state as the most appropriate political forms for a Christian nation. Many even embraced the corresponding notion that Christianity was peculiarly "the religion of liberty."

The pious atmosphere generated by evangelical activity—and the particular political pressures brought to bear by evangelical coalitions—were not, to be sure, conducive to Madison's sort of fastidiousness about the separation of church and state. Most states had readily granted tax exemptions and the benefits of legal incorporation to churches—and even these gestures Madison regarded as wrong in principle—and state legislatures frequently acceded to evangelically inspired demands for the tightening of laws against blasphemy, Sabbath desecration, and vice. Indeed, not only evangelical ministers, but politicians and judges (even Supreme Court justices) in the nineteenth century often described America as a "Christian country."

There were certainly politically significant opponents of these trends, sometimes quite religious themselves, who championed Jeffersonian or Madisonian principles of strict separation, and

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sometimes with considerable success. Beginning in the Madison administration, for example, the federal government made a point of delivering mail on Sundays to demonstrate religious impartiality, and this policy was defended for some decades against the bitter and increasingly well-organized protests of evangelical churches. But, on the whole, such opposition was neither highly polarizing nor highly effective. That was partly because evangelical forces did respect the separation of church and state in a general way—they certainly did not seek legal sanctions to enforce churchgoing or professions of Christian faith. And, moreover, advocates of a stricter separation between church and state did not, themselves, deny—as even Jefferson and Madison had not denied—that government had some proper role in enforcing moral norms. Then, as now, it was not easy to disentangle "morality" from "Christian morality."

Most clergymen were no more anxious to clarify these ambiguities. Even sabbatarian laws, on which many evangelical denominations placed great emphasis in the nineteenth century, were often defended—by evangelical ministers themselves—as enforcing merely a "civil" rather than a "religious" Sabbath since they did not force anyone to attend church services. Laws against drinking and gambling and other vices could be defended even more directly in "civil" terms; it was, in fact, hard to isolate their "religious" significance when missionary societies frequently boasted of their contribution to American prosperity in stimulating "industry and sobriety."

Yet for all the emotion displayed at revival meetings, popular religion in the nineteenth century was already curiously "secularized" in many ways. Tocqueville, like many foreign observers, was struck by the casualness of Americans toward theological differences between the various churches, which made them feel quite comfortable listening to preachers of competing denominations. The eagerness of many evangelical ministers to regard America as a peculiarly "Christian nation" may actually have reenforced this preoccupation with "morality" at the expense of doctrinal belief since "Christian morality" was often all that the various sects could agree upon—and evangelizing ministers found that theological fine points did not have mass appeal. At the same time, the morality preached by the churches was, in most respects, compatible with the outlook of an expanding commercial society, and much nineteenth-century preaching reenforced this outlook by emphasizing the material rewards of "Christian living." Tocqueville was thus equally struck by the near universality of professions of Christian belief and by the extent to which Christian belief was regarded as entirely compatible with the prevailing political ethic of "self-interest rightly understood." And

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prevailing Christian belief, as Tocqueville noted, did not at all inhibit the simultaneous profession of an optimistic democratic confidence in the "indefinite perfectibility of man."

The dominant religious preoccupation with "morality" undoubtedly helps to account for the remarkable ease with which the common schools movement for state-regulated and state-supported public education gained acceptance, at least in Northern states, beginning in the 1840s. Primary education had previously been left, for the most part, to churches and mission societies, but there was little clerical opposition to the development of nonsectarian public schools. The transition was often eased by the incorporation of Bible reading and quasi-religious instruction in "morality" into the public school curricula. But public officials and Protestant clergy insisted—and no doubt sincerely believed—that the schools were not teaching "religion" and not therefore encroaching on the domain of the churches. Still, it is revealing of the indifference to particular theological creeds that the assumption of primary responsibility for schooling by the states did not provoke any great controversy—in contrast to the fierce disputes over public education that loomed large in the politics of several European countries in the nineteenth century.

Political moralism and religious intolerance

The ratification of the Eighteenth Amendment in 1919—imposing Prohibition—is often seen as the high-water mark of evangelical influence in American politics. Enthusiasm for the "noble experiment" in national Prohibition was partly fed by fears that the virtues of nineteenth-century America were being overwhelmed by the loose morals and corruptions in the cities, with their non-Protestant majorities. Accordingly, the repeal of Prohibition in 1933 is sometimes seen as marking the final repudiation of evangelical Protestant demands on public policy or the beginning of a gradual "disestablishment" of "Protestant culture" and the fading of earlier visions of a "Christian America." The national rejection of Prohibition does seem to have encouraged the leading Northern Protestant denominations to become more accepting of religious, ethnic, and moral pluralism, while (along with the humiliations of the Scopes trial) discouraging "fundamentalists" from active involvement in national politics—at least until recently.

But "fundamentalism" was itself a twentieth-century movement (deriving its name from *The Fundamentals*, a set of theological commentaries published on the eve of the First World War) and a reaction to changes in Protestant thought already much evident

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long before the unhappy national experience with Prohibition. At the turn of the century, for example, the "social gospel" movement was influential in its claim that "the older personal ethic was not sufficient for the day of big industry and sprawling cities" and that a distinctive new "social ethic" was now required. As an older generation of evangelists had appealed beyond theological differences to a common "Christian morality," Walter Rauschenbush, one of the foremost exponents of the "social gospel," could appeal beyond the bounds of Christian belief altogether, asking "the consent" of nonbelievers and "our Jewish fellow citizens" to "use [Christ's] name" as "synonymous with the ideal of human goodness" and in that sense an acceptable name for a broader social movement: "To say that we want to moralize the social order would be both vague and powerless to most men. To say that we want to christianize it is both concrete and compelling."

The "social gospel" movement, though relatively short-lived, both mirrored and reenforced larger changes in American political thought. The Progressive Party convention that nominated Theodore Roosevelt for the presidency in 1912 included Protestant church leaders and indeed alternated political speeches with the singing of hymns in what was described by contemporary journalists as the atmosphere of a revival meeting. And since the 1930s, as Richard Neuhaus has protested, the leadership of many mainline Protestant denominations has often seemed to be "the left wing of the Democratic party at prayer."

It would be foolish to claim that a changing religious outlook was the primary cause for the changing political tendencies that have brought continual enlargements in business regulation and in redistributive spending policies in this century, along with a steady relaxation of regulation of personal morals. But it is not surprising that it has added respectability and momentum to these trends, and it is probably wrong to see this simply as a reflection of secularization or religious self-doubt. It was in the 1830s that a popular evangelical tract announced that "the millennium would commence in America" where "by the march of revolution and civil liberty, the way of the Lord is to be prepared." An identification with the larger political order—and a determination to see it as the realization of Christian principles—has been characteristic of much religious thought in America from the outset. And it has always therefore been open to the dual risks of complacently sanctifying the status quo or stimulating an uncritical zeal for reformist causes. Democratic religion has partaken of the vices of democracy.

In the nineteenth century, most clergymen emphasized aspects

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of Protestant tradition that were most favorable to prevailing conceptions of moral community and economic individualism. Now it often seems to be the reverse. But American churches have rarely been greatly concerned about historic continuity. In the 1840s, a German Lutheran minister observed that the typical American church would "not suffer itself to be embarrassed for a moment, either at its start or afterwards, by the consideration that it has no proper root in past history. Its ambition is rather to appear . . . self-sprung from the Bible or through the Bible from the skies." Emphasis on the Bible may have declined in many churches, but in an era of gay masses and lesbian priests, we cannot say that church traditions carry much more weight today.

Anti-Catholic agitation

One of the notable exceptions to this flux in American religious history, the enduring tradition of hostility and suspicion toward the Catholic Church, is very much related to the common perception of Roman Catholicism as an obstacle and exception to democratic notions of religion. In the nineteenth century, anti-Catholic agitation, though often encouraged by Protestant clergymen and drawing on larger nativist fears about immigrants, was particularly preoccupied with the control that the Catholic hierarchy exercised over the thought and belief of adherents. This was widely seen as a sinister threat to democracy, and many people remained unconvinced by the assurances of American Catholic priests and bishops of complete support for the American system of separation of church and state—assurances that failed to persuade in good part because they were periodically repudiated by official pronouncements of the Vatican. Enthusiasm for public education in many states was directly related to the hope that public schools would accustom immigrants to the patterns of American democracy and counter the influence of the priests. When Catholic bishops sought to organize separate Catholic schools, this confirmed, for many people, all their worst fears about priestly manipulation. And the principal success of anti-Catholic agitation, both before and after the Civil War, was to build unrelenting opposition to state funding of Catholic schools. When Catholic voting strength in some cities threatened to make demands for state funding successful in the 1870s, President Grant urged a constitutional amendment forbidding any government aid to religious schools (while simultaneously "forbidding the teaching in [public] schools of religious, atheistic, or pagan tenets"). Though the amendment failed by a few votes in Congress, many states adopted such restrictions in their own constitutions to ensure that

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public education funds would not be shared with separate Catholic schools.

In 1947, the U.S. Supreme Court discovered that the constitutional prohibitions sought by President Grant had, unbeknownst to all the public figures of his generation, already been implied in the Fourteenth Amendment, adopted before Grant came to office. And it is not hard to trace the continuities between the Court's contemporary vigilance against state aid to parochial schools and the anti-Catholic agitation of earlier generations. For example, contemporary cases challenging state aid for religious institutions are often brought or supported by an organization called "Americans United for Separation of Church and State." Before World War II—when such activity centered in state courts and state legislatures—the corresponding organization was called "Protestants and Other Americans United for Separation of Church and State." The Supreme Court occasionally betrays the old fear of Catholic separatism, as when Chief Justice Burger explained in a 1971 decision that government aid to religious colleges would be more constitutionally acceptable than government aid to parochial elementary schools because young children "are more impressionable and more readily indoctrinated"—as if "indoctrination" were the issue rather than a legitimate secular purpose.

Fear of the Catholic Church certainly seems rather incongruous today. In contrast to the nineteenth century, the American Catholic hierarchy's vows of support for religious liberty and the separation of church and state are now fully endorsed by the most authoritative Vatican pronouncements, while American Catholics often seem rather "Protestanized" in their view of Church authority. The old fears of "popish" conspiracy are now so faded in most of America that Pope John Paul II regularly makes it onto the list of the ten men most admired by Americans. But Catholic teachings on abortion and birth control are still viewed by many people as dangerous intrusions on moral self-determination—and not coincidentally, they are among the two issues the Supreme Court has found to be improper for democratic decision making. And the strict separationists still frequently display a "messianic" enthusiasm for public education—to borrow the term used by several thoughtful historians of American education—which is very much in the spirit of the nineteenth-century Protestant defenders of public education.

The ambiguities of civil religion

Today's strict separationists have broken with their predecessors, of course, in opposing not merely public aid to religious schools but

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also any sign of endorsement or encouragement of religion in the public schools. Charges that this policy is hostile to religion are invariably—and often, no doubt, quite sincerely—denied. Rather, strict secularism in public schools is urged as a means of facilitating, as Justice Brennan put it in the Court's original decision on school Bible reading, "the training of American citizens in an atmosphere free of parochial, divisive or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions."

The strains in this position nicely illustrate the larger contemporary ambivalence about the place of religion in our public life. On the one hand, the appeal to a "common heritage" that flows above or below "divisive" influences does not seem to have made much of an impression on general public opinion. Polls continue to show that majorities as large as 80 percent favor some form of voluntary, nonsectarian prayer in public schools. Perhaps most people cannot conceive of a "common heritage" that has no reference to religion. Or perhaps most people assume that, as public schools once sought to embrace a common Protestant "morality," they can now embrace a larger "Judeo-Christian ethic" involving some noncontroversial acknowledgment of dependence on God. This assumption might underestimate the difficulties of composing a prayer or religious ritual that can be accepted by all faiths as common. But the awkwardness of insisting on the removal of all divisive influences is that it has no ready stopping point—as courts are now discovering in their efforts to satisfy the objections of fundamentalist parents to the teaching of "secular humanist" doctrines in the schools.[2]

On the other hand, it is striking that the Supreme Court and most who applaud its position on school prayer have not sought to

[2] The obvious counterargument—that the language of the Constitution forbids the "establishment of religion" and not the establishment of other forms of opinion—is perhaps only convincing to those already convinced. It is, after all, not the actual language of the First Amendment that applies to the public schools but the broader and far more general guarantee of "liberty" in the Fourteenth Amendment, and if this language prohibits even minute acknowledgments of religion in the public schools it is not at all obvious why these are the only acknowledgments it should prohibit. Moreover, the Supreme Court has often rejected the adequacy of narrow or conventional definitions of "religion." In the 1960s, for example, it insisted that "conscientious objector" exemptions from military conscription had to be made available not only to religious pacifists but also to those holding philosophic views "analogous to belief in a Supreme Being." In a different decision in the early 1960s, striking down a state ban on office-holding by atheists, the Court listed "secular humanism" as one of the many forms of "religious belief" in America. If a one-sentence "prayer," simply acknowledging "our dependence" on "the Almighty," constitutes an "establishment of religion," as the Court ruled in the original school prayer decision, it is not obvious why the school recitations of the Pledge of Allegiance do not "establish" a national cult—nor why, as some fundamentalist parents now charge, moral teachings about liberty and individual independence without reference to God do not "establish" "secular humanism."

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pursue the "separationist" doctrine behind it to its logical conclusion. Schools are still allowed to maintain the daily ritual of the flag salute, with its affirmation of America as "one nation, under God." Religious invocations or benedictions by ministers, priests, and rabbis are still routinely scheduled at the opening of legislative sessions, at presidential inaugurations, and other public ceremonial occasions. Many advocates of strict separation agree with the Supreme Court's rationale that these are now of "merely ceremonial" rather than truly "religious" significance. The interesting thing is that many people still insist that there is some quasi-religious significance in the "ceremonial" invocations of divine authority that remain in American public life. There also seems to be a significant strain in contemporary thought, among liberals as well as conservatives, that hungers to invest public purposes with a sacred aura.

The force of this strain among liberals is best illustrated by the enthusiasm that has been expressed for Robert Bellah's notion of an "American civil religion," quite separate from Christianity or Biblical religion, which has maintained the Puritan conception of America as a nation with a special destiny and a special "covenant." Historians of religion in America have not, in fact, found much evidence to support Bellah's claim that the God invoked by Lincoln—the God whose judgments are true and righteous altogether—or the God thanked by the American people in civil holidays like Thanksgiving was ever understood by most Americans to be distinct from the God they worshipped in churches. But the appeal of the "civil religion," as Bellah himself has quite candidly conceded, is not to instill piety toward God but toward contemporary liberal causes. It is to inspire, as Bellah put it in the mid-1970s in a lament for America's "Broken Covenant," a rebirth of American "idealism" in a "movement" with "a political, I believe, socialist side."

If socialism is not everyone's idea of the American creed, conservatives still have great difficulty arguing that "idealistic" new programs are not required by the teachings of "religion." Protestant and Catholic and Jewish clergymen are anxious to assure us that more ambitious social policies are indeed required by "religion." The enthusiasm of liberal Protestant churchmen for liberal causes may be the least nuanced because Northern Protestant clergy have so long been accustomed to identify their causes with the national cause. Even Pastor Neuhaus' book, *The Naked Public Square*, a biting polemic against the leftward tilt of the contemporary mainline churches, still concludes that what America needs is more religious influence on public policy.

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A great many conservatives insist that a religious outlook that identifies its social mission with the advancement of liberal social programs cannot be genuinely religious—a view that seems to find some sympathy from critics like Neuhaus. Thus, critics of religious liberalism often fault it for failing to recognize human sinfulness or human frailty or an ultimate human dependence on a saving grace that cannot be secured by human institutions. These may well be theologically well-grounded complaints, but it is not surprising that they have failed to exert great influence. The dominant religious outlook in nineteenth-century America does not seem to have been much more attentive to these preoccupations of older religious traditions.

It is not even quite true that the political agenda of contemporary liberalism presents a clear contrast to the political agendas that inspired enthusiasm among evangelical sects in the nineteenth century. Liberal Protestant church organizations, and a good many Catholics, may seem more interested in economic redistribution than in the kind of self-control stressed by the temperance movement or in the severe sexual morality enforced by laws in the nineteenth century. But contemporary liberalism has its own preoccupations with personal character and its own quarrels with human nature, most evident in its wholehearted embrace of contemporary feminism, which—for better or worse—aims to "raise consciousness" and alter some of the most intimate and fundamental aspects of thought and behavior in daily life. And feminism has proved to have extraordinary appeal for the larger portion of the American clergy. Even many Catholic bishops have expressed sympathy for the feminist agenda—despite the fact that the Catholic Church, among the most firm in its opposition to abortion and among the last churches to insist on an all-male clergy, might have special reasons for caution.

Feminism may defy the wisdom and authority of older religious traditions, and it may be bad in certain respects for the stability of American families and the stability of American society. But it seems unlikely that conservative appeals to "religion" can do anything in themselves to alter opinion on these questions, since so much of contemporary "religion" sits comfortably on the feminist bandwagon. Certainly the restoration of prayer to public schools, an ambition that has engaged so much energy of the New Right, seems quite unlikely to make a difference to the larger cultural battles now raging in American society.

There is this consolation for people who do not like the cultural or

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political trends championed by contemporary liberals: The same Protestant outlook that has made it possible to assimilate contemporary liberal causes to "religion" has made it just as conceivable for many churchgoers to disregard the political preachings they don't agree with. This is another aspect of democratic religion—it is easy for people to disagree with their church yet feel no less religious for it.

When government appeals to religion

The greatest contribution of religion to our constitutional order might be the one that figured so largely in the original arguments for limited government: Religion may put political and legal disputes in better perspective by reminding us that, in the end, our souls can neither be saved nor lost by mere governments. It continues to be one of the boasts of the American constitutional order that it allows many sects—"sects" in the traditional European sense of religious communities withdrawn from the larger society—to pursue their religious visions relatively unmolested.

But the same Declaration of Independence that honors this private sphere, this limit on governmental or public pretension, also claims that it is not only the right of the people, but "it is their duty" to change governments subversive of their rights. It refuses, in a sense, to acknowledge the withdrawal of the sect as the proper stance toward government. At the same time, most religious traditions teach a concern for the welfare of others which is not readily reconciled with the isolation of the sect. And there are times when governments must appeal quite directly to the hope and trust vouchsafed by religion.

Thus even James Madison, the most fastidious and scrupulous of all the Founders in his conception of the proper separation of church and state, compromised his principles—as he himself saw it—to urge the American people to seek divine assistance in an hour of peril. During the War of 1812, a war that went so badly that for a time the President and Congress had to flee the capital, returning to find the White House and the Capitol building in smoldering ruins, Madison issued a proclamation declaring a special day of prayer for the success of American arms. It was not at all a perfunctory admonition, like contemporary presidential proclamations for Thanksgiving Day. Echoing the prophets of ancient Israel, Madison called on the American people to observe a day of "public humiliation and prayer" for "the devout purposes" of rendering "public homage" to "the Sovereign of the Universe," of "acknowledging the transgressions which might justly provoke the manifestations of His

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divine displeasure; of seeking His merciful forgiveness and His assistance in the great duties of repentance and amendment, and especially of offering fervent supplications that in the present season of calamity and war He would take the American people under His peculiar care and protection. . . ."

Even today's militant separationists may find something moving in this appeal for a beleaguered nation to unite in prayer. Ironically, though, prayer and repentance was not enough to unite the nation in 1812. In New England, then accounted to be the most pious and orthodox section of the country, the American war effort was denounced as "originating in the basest of selfish motives, totally aggressive in its nature, conducted by folly and profligacy," and, perhaps predictably, "experiencing the frowns of heaven at every step."

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